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Supreme Court, U.S.
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No. 07-

In the Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. and TKS (USA), INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, a large Japanese manufacturer and its U.S. subsidiary, seek to nullify the $31 million federal judgment against them by filing suit in Japan under a Japanese law that declares the U. S. judgment "invalid." The Japanese clawback law allows respondents to recover the full amount of the judgment, plus interest and attorneys' fees. The district court enjoined the Japanese clawback suit, finding it "a direct attack on [the] court's judgment" and "a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole." The Eighth Circuit reversed. Although "profoundly aware" that the clawback would "nullify" the district court's judgment, the court of appeals held that the federal courts lost jurisdiction to enter an antisuit injunction once respondents paid the judgment, and that such an injunction was "contrary to principles of comity." That holding is in direct conflict with the Second Circuit's subsequent decision in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 2007 WL 2537466 at *15 (2d Cir. Sept. 7, 2007). Moreover, it adds to the pervasive conflict among nine circuits concerning the role comity should play in determining the propriety of international antisuit injunctions.

The questions presented are:

1. Whether the Eighth Circuit erred by holding that once a defendant pays a money judgment, the federal courts lose jurisdiction to maintain an injunction precluding the defendant from pursuing litigation in a foreign court to nullify the U.S. judgment.

2. Whether the Eighth Circuit erred by giving dispositive weight to concerns about international comity at the expense of the courts' traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation.

RULES 14.1 AND 29.6 STATEMENT

The petitioner is Goss International Corporation, the only U.S. manufacturer of large newspaper printing presses.

Heidelberger Druckmaschinen AG, a publicly held corporation, owns 10 percent or more of Goss International Corporation's stock. No other publicly held corporations own 10 percent or more of Goss International Corporation's stock.

Respondents are Tokyo Kikai Seisakusho, Ltd. and its U.S. subsidiary, TKS (USA), Inc.

In addition to respondents, MAN Roland Druckmaschinen Aktiengesellschaft, Man Roland, Inc., Koenig & Bauer Aktiengesellschaft, KBA North America Inc., Mitsubishi Heavy Industries, Ltd., and MLP U.S.A. Inc. were defendants before the district court, but are not parties to this appeal.

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PETITION FOR WRIT OF CERTIORARI

Goss International Corporation ("Goss") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

This case concerns whether respondents, Tokyo Kikai Seisakusho, Ltd., a large Japanese printing press manufacturer, and TKS (USA), Inc., its U.S. subsidiary, (collectively, "TKS") may be enjoined from nullifying the final judgment of a federal court awarding Goss $31 million in damages on a jury verdict. The district court entered the final judgment in Goss' favor on December 4, 2003. The Eighth Circuit's decision affirming that judgment is reported at 434 F.3d 1081 (App., *infra*, 86a). This Court denied TKS' petition for a writ of certiorari, which is reported at 126 S. Ct. 2363 (*id.* 85a). The same day, TKS gave notice of its intention to nullify the judgment through a "clawback" suit in Japan.

The district court then entered an antisuit injunction barring TKS from pursuing the foreign clawback action. The opinion of the district court is reported at 435 F. Supp. 2d 919 (App., *infra*, 61a). The court of appeals reversed. The amended opinion of the court of appeals is reported at 491 F.3d 355 (*id.* 1a).

JURISDICTION

The judgment of the court of appeals in the current proceeding was entered on June 18, 2007. (App., *infra*, 32a.) Goss timely filed a petition for rehearing *en banc* on June 29, 2007. The court of appeals denied Goss' rehearing petition on July 24, 2007 (*id.* 31a) and issued its amended opinion on July 31, 2007 (*id.* 1a). The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The relevant portion of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), states:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The full text of the supplemental jurisdiction statute, 28 U.S.C. § 1367, is reproduced at App., *infra*, 129a-130a.

The Japanese "clawback" statute, entitled "The Special Measures Law Concerning the Obligation to Reimburse Benefits, etc. Gained Under the US Antidumping Act of 1916," states, in relevant part:[1]

> **Obligation to reimburse benefits, etc. Article 3** – Parties who have benefited from the final judgment of a foreign court rendered in accordance with the US Antidumping Act of 1916 and, as a result, caused losses to the Japanese corporations, etc. (hereinafter called the "beneficiaries"), shall reimburse such benefits with interest.
>
> 2. In the cases of the previous clause, when the Japanese corporations, etc. suffer damages including attorneys' fees to prepare and follow court procedures in accordance with the US Antidumping Act of 1916, the beneficiaries are responsible to indemnify such losses.
>
> 3. In the cases of the previous two clauses, the parties who are applicable to one of the following items shall undertake obligations jointly with the beneficiaries to reimburse the benefits and indemnify the losses to the Japanese corporations, etc. Provided, however, that the law shall not prevent the parties from executing their right to indemnify against the beneficiaries:

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[1] The full Japanese text of the statute and a complete English translation, together with a translator's affidavit, appear in Goss' appendix in the court of appeals at GA-8-GA-23. TKS offered a separate translation in its appendix in the court of appeals at App. 77. Although the translations vary slightly, the import of both translations is the same.

* * *

A corporation that all the issued shares, etc. are owned by the beneficiaries.

* * *

Validity of final judgment rendered by foreign courts. Article 6 – Any final judgment rendered by foreign courts on a claim filed against a Japanese corporation, etc. under the US Antidumping Act of 1916 shall be invalid.

STATEMENT OF THE CASE

This case presents a direct conflict between the Eighth and Second Circuits over whether a federal court has jurisdiction, after the defendant has satisfied the court's adverse judgment, to enjoin the defendant from pursuing litigation in a foreign court aimed at nullifying the U.S. judgment. The Eighth Circuit held that the district court lost jurisdiction to enter such an injunction once the defendant paid the judgment. The Second Circuit recently addressed the identical issue, expressly considered and rejected the Eighth Circuit's position in this case, and held that the courts have jurisdiction to enjoin litigants from pursuing foreign litigation even after satisfaction of a U.S. judgment.

This case also presents the Court with an opportunity to resolve conflicts among nine circuits concerning the appropriate standard for issuing foreign antisuit injunctions and the proper weight to be given to international comity in making those decisions. The Eighth Circuit joined two other circuits in adopting

the most restrictive version of the so-called "conservative approach," which gives great deference to comity and allows for the issuance of foreign antisuit injunctions only where necessary to preserve U.S. jurisdiction or protect an important U.S. policy. Three other circuits have adopted a "traditional version" of the conservative approach, which also gives great weight to comity, but considers equitable factors in determining whether to issue an injunction. Three other circuits have adopted the so-called "liberal approach," which gives less weight to comity and which the Eighth Circuit expressly rejected.

By allowing comity to trump protection of a final federal judgment, the Eighth Circuit rendered an erroneous decision with serious and wide-ranging implications for the role of the federal judiciary and U.S. law in today's global economy. TKS came to the United States to do business and take advantage of U.S. markets and laws. Over several decades, TKS sold millions of dollars of foreign-produced press equipment here. After years of litigation, a federal jury determined that many of those sales violated U.S. law. The district court entered a final judgment of more than $31 million to compensate Goss for the damage caused by TKS' unlawful activity. Although the Eighth Circuit upheld the judgment on appeal, it later refused to enjoin TKS from clawing back the judgment in Japan. In the appellate court's own words, this ruling will now permit TKS to "effectively nullify" the judgment. (App., *infra*, 25a.)

This ruling strikes at the heart of our judicial system. If, as the Eighth Circuit held, federal courts are powerless to prevent litigants from nullifying

federal judgments in another court, the federal courts' ability to finally resolve conflicts is seriously undermined and the integrity of the judicial function is called into question. The district court's admonition, that respondents' use of the clawback law was a "frontal assault on . . . the federal judiciary as a whole," does not overstate the problem. (App., *infra*, 78a.) This Court should resolve the important question of whether federal courts have the power to protect their final judgments from being nullified through subsequent litigation.

A. The Underlying Suit And Judgment

In 2000, Goss Graphic Systems, Inc.[2] brought suit against TKS, under the Antidumping Act of 1916, 15 U.S.C. § 72 (the "1916 Act"). After nearly four years of litigation and a three-week trial, the jury determined that TKS violated the 1916 Act by dumping millions of dollars worth of newspaper press equipment on the U.S. market with the intent of destroying or injuring the U.S. industry. (App., *infra*, 127a.) Based on this verdict, the district court entered a $31,619,847 judgment for Goss.

TKS unsuccessfully appealed the judgment to the Eighth Circuit and unsuccessfully petitioned for rehearing, rehearing *en banc*, and a writ of certiorari. On June 5, 2006, this Court denied certiorari, exhausting TKS' appeals of the underlying money judgment. (App., *infra*, 85a.)

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[2] Goss acquired Goss Graphic Systems' assets in February 2002 and substituted as plaintiff in this case.

B. The Prospective Repeal Of The 1916 Act

In November 2004, Congress prospectively repealed the 1916 Act in response to a ruling by the World Trade Organization. In doing so, Congress was well aware of the judgment in this case and the Government of Japan's position that the 1916 Act should be repealed retroactively so as to nullify the judgment.[3] Congress nonetheless chose to *preserve* the judgment in this case by repealing the 1916 Act only prospectively.

C. Japan Passed A "Clawback" Statute To Invalidate And Nullify The U.S. Judgment.

While TKS' appeal of the final judgment was pending, TKS successfully lobbied the Japanese Government for special legislation with the sole purpose of undoing the final judgment in this case. (Goss CA App. at GA-79.) In response, the Japanese Diet passed a "clawback" statute, entitled "The Special Measures Law Concerning the Obligation to Reimburse Benefits, etc. Gained Under the US Antidumping Act of

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[3] *See, e.g.*, H.R. Rep. 108-415 (2004) ("The only 1916 Act case now pending is an Iowa case in which a jury found $10.5 million in actual damages [trebled by that court to $31 million] against a Japanese company on December 3, 2003."). In the three years preceding the repeal, Japan demanded on seventeen separate occasions that the 1916 Act be retroactively repealed and, each time, argued that Congress should eliminate the judgment in this case. (TKS CA App. 1020, 1149, 1164, 1229, 1350, 1385, 1629, 1660, 1670, 1680, 1696, 1709, 1727, 1735, 1745, 1752, 1763.) Even after Congress passed the repeal bill, but before the President signed it, Japan again complained to the Administration that the repeal bill was not retroactive. (TKS CA Opening Br. at 47) (*quoting* Japan's statements to the USTR.) Despite Japan's complaint, the President approved Congress' decision and signed the prospective-only repeal bill into law.

1916" (the "Special Measures Law") in November 2004. The Special Measures Law specifically targets the final judgment in this case. In its press release announcing the legislation, the Japanese Ministry of Economic Trade and Industry ("METI") identified by name this judgment as the reason for the law. (*Id.* at GA-22.)

The Special Measures Law is a "clawback" statute in the purest sense. It has only one element for establishing the liability of a U.S. company—namely, that the U.S. litigant received payment from a Japanese defendant under a 1916 Act judgment.[4] (Goss CA App. at GA-16, Art. 1) (clawback law requires winning U.S. plaintiff to return damages it wins under 1916 Act "to protect the parties who have suffered losses under the said law.") A U.S. company that wins damages under the 1916 Act is thus forced to disgorge the entire U.S. damage award to the losing defendant, plus interest, costs, and attorneys' fees. The law also imposes liability on any of the U.S. company's wholly-owned subsidiaries. (*Id.* at Art. 3.) The Special Measures Law further declares that any U.S. judgment under the 1916 Act is "invalid." (*Id.* at GA-17, Art. 6.)

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[4] As Japan admitted in its *amicus* brief filed below, "the sole basis for Goss's liability under the Japanese Special Measures Law is Goss' receipt of damages awarded by [the district court]." (Japan CA *Amicus* Br. at 13.) TKS also conceded that the goal of the Special Measures Law is to "neutralize" the judgment entered by the district court. (TKS CA Opening Br. at 39.)

D. TKS Announced Its Intention To Claw Back In Japan The U.S. Judgment, And The District Court Enjoined TKS From Filing A Clawback Action.

On June 5, 2006, hours after this Court denied TKS' petition for certiorari, TKS informed Goss that it would seek to nullify the final judgment in this case by filing a suit in Japan under the Special Measures Law.[5] (Goss CA App. at GA-7.) TKS' imminent suit presented an immediate threat to Goss and its Japanese affiliate, Goss Graphic Systems Japan Corporation ("Goss Japan"), and endangered Goss Japan's very survival. (App., *infra*, 82a.) Further, Goss and its affiliate would be forced to defend themselves in Japan, despite a final U.S. judgment in Goss' favor. Thus, Goss moved the district court for a preliminary antisuit injunction.

After an evidentiary hearing, the district court determined that the Special Measures Law exists "'for the sole purpose of terminating' the court's judgment in Goss' favor, thereby in a single filing attempting to undo six years of federal court litigation." (App., *infra*,

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[5] In November 2004, just before passage of the Special Measures Law, Goss sought a preliminary antisuit injunction. At that time, TKS had not paid the judgment and was vigorously contesting it on appeal. During the November 2004 hearing, TKS agreed to be enjoined from using the clawback statute until it exhausted all appeals and expressed its intention to pursue a clawback action. (TKS CA Opening Br. at 2-3.) Even before Goss obtained judgment on the bond against TKS' surety (after which TKS paid the judgment), TKS announced its intention to pursue an action in Japan under the clawback statute.

78a.)[6] The district court held that TKS' "vexatious and oppressive" suit under the clawback statute is "a direct attack on the court's judgment in favor of Goss and a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole." (*Id.*) The court entered a preliminary injunction prohibiting TKS from proceeding under the clawback statute.

After entry of the preliminary injunction, TKS paid the $31 million judgment, and then appealed the injunction order to the Eighth Circuit. The Eighth Circuit *sua sponte* issued an order requiring the parties to file supplemental briefs on whether the injunction was rendered moot by TKS' payment of the monetary judgment. (CA 9/6/06 Order.)

E. The Eighth Circuit Reversed The District Court's Injunction, Deepening A Three-Way Conflict Among The Circuits.

The Eighth Circuit reversed the district court's injunction order and vacated the preliminary injunction. (App., *infra,* 29a.) The court held that once TKS paid the money judgment, the federal courts lost jurisdiction to protect that judgment. The court also held that, under a restrictive version of the so-called "conservative approach" to international antisuit injunctions, concerns over international comity and deference to the Government of Japan outweighed the federal courts' interests in protecting the judgment once it was paid. In adopting that approach, the lower court joined two other circuits in a three-way circuit split. Three other circuits have chosen a competing

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[6] Internal quotation from *Laker Airways Ltd. v. Sabena,*, 731 F.2d 909, 927 (D.C. Cir. 1984).

version of the conservative approach, and at least three more circuits have chosen an opposing "liberal approach" that gives less weight to international comity and more emphasis to protecting federal judgments and jurisdiction from collateral attacks abroad.

F. TKS Sued Goss In Japan Under The Clawback Statute And Continues To Operate In The United States With Impunity.

In August 2007, TKS sued Goss and Goss Japan in Tokyo District Court under the clawback statute. TKS' suit seeks the return of Goss' $31,619,847 damage award, plus Goss' fee award in this litigation. TKS also seeks interest on these funds and its attorneys' fees and costs. TKS has filed a pre-judgment attachment in Japan against Goss Japan's assets, placing a large lien on those assets.

If TKS wins its clawback suit in Japan, it will have succeeded in coming to the United States to do business, intentionally violating U.S. law, causing millions of dollars in damage to Goss, and yet ultimately avoiding all liability for its unlawful conduct. TKS remains free to do business in the United States. It has repeatedly stated publicly that, notwithstanding the judgment in this case, it will service customers in the United States "for years to come" and pursue "new business and services in the U.S." (Goss CA App. at GA-36.) In an open letter to its U.S. newspaper customers, TKS criticized the federal courts' decisions in this case, declaring that "regardless of the foregoing legal dispute and its ultimate outcome, TKS, through its U.S. subsidiary, TKS (U.S.A.), Inc., will continue to

provide world-class, cutting-edge press technologies and services to the U.S. newspaper industry." (*Id.* at GA-34.)[7]

G. The Second Circuit Rejected The Eighth Circuit's Ruling.

Just months after the Eighth Circuit's ruling, the Second Circuit faced the exact same question—whether a federal court retains jurisdiction, after satisfaction of a monetary judgment, to protect the judgment from nullification in a foreign proceeding. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 WL 2537466 (2d Cir. Sept. 7, 2007), the Second Circuit reviewed a trial court's grant of an antisuit injunction that barred the losing defendant from seeking to nullify a satisfied money judgment through a foreign action. The Second Circuit specifically

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[7] While seeking to nullify more than six years of federal litigation, TKS has continued to take advantage of the U.S. legal system. In February 2006, TKS filed a malpractice suit against its former attorneys in this case. *TKS (U.S.A.), Inc., v. Perkins Coie, D.C., LLP*, Civ. Action No. 06-1258 (D.C. Super. Ct.). Among its allegations, TKS claimed that its former attorneys advised it to commit the fraud Goss uncovered in this case—including fraud on the federal government—and that the attorneys were negligent in producing during discovery allegedly privileged documents revealing the fraud. TKS recently settled the malpractice case for $19 million. *See* Nathan Carlile, *Hidden Rebate Causes Big Trouble for Perkins Coie, Malpractice Suit Directed at Two D.C. Partners Results in $19 Million Payout*, LEGAL TIMES, Sept. 17, 2007, http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1189501356339.

considered the Eighth Circuit's ruling in this case and rejected it. The court held that federal courts have continuing jurisdiction to enjoin parties before them from "relitigating issues in a non-federal forum that were already decided in federal court . . . *even after a judgment has been satisfied.*" *Id.* at *14 (emphasis added). Otherwise, the court observed, losing defendants "would be free to engage in vexatious proceedings" abroad that "are intended to undermine or vitiate federal judgments." *Id.* at *15.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve conflict among the circuits regarding two important and recurring questions of federal jurisdiction and international comity that go to the heart of the federal courts' power to protect and effectuate their judgments.

A direct conflict exists between the Eighth and Second Circuits over whether federal courts retain jurisdiction to protect their judgments from attack after the judgments are paid or satisfied. The Eighth Circuit held that when TKS paid the judgment, the district court lost jurisdiction to enter an injunction prohibiting TKS from nullifying the judgment through a Japanese clawback action. The Second Circuit expressly rejected the Eighth Circuit's holding, and ruled that the district court retained jurisdiction, even after satisfaction of judgment, to enjoin the defendant from proceeding with a foreign suit aimed at nullifying the judgment. *Karaha*, 2007 WL 2537466 at *14. The Second Circuit explained that the Eighth Circuit's contrary holding would permit international firms to

engage in "vexatious proceedings" that are "intended to undermine or vitiate federal judgments." *Id.* at *15.

The decision here also adds to a conflict among eight other circuits over the weight to give to comity in gauging the propriety of international antisuit injunctions. The Eighth Circuit joined two other circuits in adopting an approach that gives great deference to international comity to the exclusion of nearly all other factors. Applying that approach, the Eighth Circuit bowed to a Japanese clawback statute that the court acknowledged would "effectively nullify" the final judgment in this case. (App., *infra,* 25a.) Three other circuits apply a less restrictive analysis that gives weight to comity, but also considers multiple equitable factors in assessing the propriety of a foreign antisuit injunction. At least three other circuits adopt yet another approach that gives less deference to international comity.

The standards for obtaining a foreign antisuit injunction are in utter disarray, leading to flatly inconsistent results—as this case and *Kahara* demonstrate—and encouraging forum shopping. These deep disagreements among the circuits also have wide-ranging implications for the federal judiciary and its ability to enforce U.S. laws against foreign firms doing business in the United States. The Eighth Circuit's holding invites international firms and cartels to do business in the United States, violate U.S. law, and then insulate themselves from liability through foreign proceedings. The district court accurately described TKS' intended use of the Japanese clawback statute as a "direct attack" on the court's judgment and "a frontal assault on the jurisdiction of

[the] court and the federal judiciary as a whole." (App., *infra*, 78a.)

The Eighth Circuit's holding that courts are powerless to prevent such vexatious conduct will encourage foreign countries to enact clawback legislation to undermine any U.S. law they find objectionable and losing litigants to file suit abroad to relitigate or nullify federal judgments entered against them. The decision threatens to create a dual system of justice, in which international firms operating in the U.S. can escape liability from laws that U.S. citizens and domestic firms are bound to obey.

The decision below also has serious adverse implications for purely domestic cases. This Court and the lower federal courts have long upheld the inherent power of federal courts to protect and effectuate their judgments, including through domestic antisuit injunctions prohibiting losing federal litigants from filing suit in state courts to undermine federal judgments. The Eighth Circuit's decision would tie the hands of the federal judiciary in these situations as well, inviting vexatious relitigation and collateral attacks against federal judgments in both state and foreign courts.

This Court's review is essential to resolve squarely presented issues of great importance to U.S. litigants and the integrity of the federal legal system. The circuit splits, upon which the Eighth Circuit's erroneous decision rests, are well developed and acute, and involve recurring issues of federal jurisdiction.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE TWO IMPORTANT INTERCIRCUIT CONFLICTS.

A. The Circuits Are In Conflict Over The Jurisdiction Of Federal Courts To Protect Final Judgments From Collateral Attack.

The Eighth Circuit's decision in this case is in direct conflict with the Second Circuit's recent holding that federal courts have continuing jurisdiction to enjoin parties before them from "relitigating issues in a non-federal forum that were already decided in federal court . . . *even after a judgment has been satisfied.*" *Karaha*, 2007 WL 2537466 at *14 (emphasis added).

As in this case, the losing defendant in *Karaha* commenced a foreign proceeding after the entry of final judgments in the United States, with "the obvious purpose of nullifying the judgments of the [U.S. district courts]." *Id.* at *5 (citation and quotation marks omitted). The plaintiff in *Karaha* received an arbitral award against the defendant in a Swiss arbitration proceeding, confirmed that award in a U.S. district court in Texas, and then registered the Texas court's judgment with a New York district court. *Id.* at *3. Once the Texas court's judgment was paid and fully satisfied, the foreign defendant sued the U.S. plaintiff in the Cayman Islands, alleging a "new" fraud claim. *Id.* at *4. The New York district court, finding that the Cayman Islands action was "a misuse of the foreign court to evade the American judgments," enjoined the defendant from proceeding in the Cayman Islands. *Karaha Bodas Co. v. Pertamina*, 465 F. Supp. 2d 283, 295 (S.D.N.Y. 2006). The Second Circuit affirmed, finding that "the District Court

retained—and retains—continuing jurisdiction to maintain the anti-foreign-suit injunction even though the federal judgments against [the defendant] have been satisfied." *Karaha*, 2007 WL 2537466 at *15.

In reaching its decision, the Second Circuit specifically rejected the Eighth Circuit's holding and rationale in this case. The Second Circuit concluded that the Eighth Circuit's limited view of federal jurisdiction would leave defendants "free to engage in vexatious proceedings" that are "intended to undermine or vitiate federal judgments." *Id.* at *15.

Significantly, in reaching their opposite conclusions, the courts of appeals in this case and in *Karaha* relied upon the same precedents from this Court—notably, *Peacock v. Thomas*, 516 U.S. 349 (1996), and *Riggs v. Johnson County*, 73 U.S. 166 (1867).[8] Both courts of appeals looked to this Court's observation in *Riggs* that jurisdiction "continues until th[e] judgment shall be satisfied." *Riggs*, 73 U.S. at 187. The Eighth Circuit construed this language to mean that jurisdiction continues *only* until the judgment is satisfied. (App., *infra*, 21a.) Accordingly, the Eighth Circuit found that, under *Riggs*, the satisfaction of the district court's final money judgment rendered the court powerless to protect that judgment from being nullified by the Japanese clawback suit. (*Id.*)

The Second Circuit, observing that the cases addressing the boundaries of ancillary jurisdiction "are hardly a model of clarity," rejected the Eighth Circuit's reading of the phrase from *Riggs*. Instead, the

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[8] The *Karaha* court quoted the Eighth Circuit's quotation of *Riggs* without attribution to the *Riggs* case. 2007 WL 2537466 at *14.

Second Circuit reached the opposite result, holding that jurisdiction continues even after satisfaction of judgment. *Karaha*, 2007 WL 2537466 at *14. In reaching that conclusion, the Second Circuit looked to *Peacock*, 516 U.S. at 356-57, which cited the same sentence from *Riggs* upon which the Eighth Circuit relied. *Karaha*, 2007 WL 2537466 at *14. Although *Peacock* did not address the jurisdictional question presented here,[9] the Court recognized that "[w]ithout jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock*, 516 U.S. at 356 (*quoting Riggs*, 73 U.S. at 187).

The Eighth Circuit erred in reading *Riggs* to hold that jurisdiction terminates after the entry of a satisfaction of judgment. The issue in *Riggs* was whether the district court had jurisdiction to compel county officials to assess taxes to satisfy a final judgment against the county. 73 U.S. at 187. Because the money judgment in *Riggs* had not yet been satisfied, *Riggs* did not consider whether the courts have jurisdiction to enjoin subsequent litigation aimed at nullifying a satisfied judgment. As the Sixth Circuit observed in *Lytle v. Freedom Int'l Carrier, S.A.*, 519

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[9] *Peacock* involved a plaintiff's attempt "in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." 516 U.S. at 357. The Court found that the district court's jurisdiction in the original suit did not extend to the plaintiff's attempt in a subsequent lawsuit seeking "to *establish liability*" of a third party. *Id.* at 357 n.6 (quotation omitted). *Karaha* recognized that *Peacock* is distinguishable from the current issue on the ground that it concerned new claims "*involving third parties*." *Karaha*, 2007 WL 2537466 at *14 n.19 (quotation omitted).

F.2d 129, 132 (6th Cir. 1975), neither *Riggs* nor its progeny "deals with the circumstances where the district court purports to exercise jurisdiction after the filing of satisfactions of judgment."

This Court should resolve the stark conflict between the Eighth and Second Circuits. The decisions here and in *Karaha* reach diametrically opposed conclusions on the same important issue of federal jurisdiction. There is no doubt that, applying the standards articulated in *Karaha*, the Second Circuit would have upheld the antisuit injunction that the Eighth Circuit here set aside. And, both the Eighth and Second Circuits' decisions rest on contradictory interpretations of this Court's opinions in *Peacock* and *Riggs*, demonstrating a clear need for this Court to clarify its prior precedent.

B. Nine Circuits Are Deeply Divided Over The Standards For Issuing Foreign Antisuit Injunctions And Whether Deference To International Comity May Trump A Final Federal Judgment.

The Eighth Circuit also rested its decision on its finding that the antisuit injunction entered by the district court was "contrary to principles of comity." (App., *infra*, 26a.) In so finding, the lower court deepened an extensive circuit split concerning the weight to be accorded to international comity in determining whether to issue a foreign antisuit injunction. Nine circuits are now evenly divided between three different approaches to this issue.

1. The Eighth Circuit Added To The Conflict Among The Circuits Concerning The Role International Comity Plays In Evaluating Foreign Antisuit Injunctions.

The Eighth Circuit determined that it could not rule on TKS' appeal of the district court's foreign antisuit injunction without first resolving the "level of deference afforded to international comity." (App., *infra*, 8a.) The court acknowledged that the question is subject to widely divergent treatment by the circuits that have already addressed it. (*Id.*) ("The circuits are split . . . on the level of deference afforded to international comity . . . ."); *see Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) ("The federal Courts of Appeals have not established a uniform rule for determining when injunctions on foreign litigation are justified."); *accord Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996).

The Eighth Circuit joined the Third and Sixth Circuits in applying the most restrictive version of the "conservative approach" to foreign antisuit injunctions. Under that approach, concerns over international comity and deference to foreign proceedings are given the most weight. As the Eighth Circuit explained, a court using this approach issues a foreign antisuit injunction only when the foreign proceeding (1) threatens the jurisdiction of the enjoining forum or an important public policy, and (2) the domestic interests outweigh concerns of international comity. (App., *infra*, 8a); *accord Deutz*, 270 F.3d at 161 (applying the "more restrictive standard," which approves

foreign antisuit inunctions "only to protect jurisdiction or an important public policy"); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992) (same).

The Eighth Circuit frankly acknowledged that TKS' foreign clawback action would "effectively nullify" the judgment in this case obtained after six years of federal litigation. (App., *infra*, 25a.) The court reasoned, however, that the restrictive conservative approach compelled the finding that comity outweighed the court's interest in protecting a final judgment. (*Id.*)

Ironically, the Eighth Circuit's strict adherence to comity resulted in its tacit approval of a foreign clawback statute, even though such statutes are themselves offensive to comity and uniformly condemned as "deplorable measure[s]" that go "beyond the pale" and represent "a step backward [] as a matter of international law." Andreas F. Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.V. Lowe*, 75 AM. J. INT'L LAW 629, 637 (1981); *accord* Michael J. Danaher, *Anti-Antitrust Law: The Clawback and Other Features of the United Kingdom Protection of Trading Interests Act, 1980*, 12 LAW & POL'Y INT'L BUS. 947, 961 (1980) (clawback laws are an "unprecedented offense" against comity and international law). Even the Eighth Circuit recognized that the clawback statute here "like other clawback or blocking provisions, can be regarded as an affront to the laws and judicial rules of the United States." (App., *infra*, 26a.)

Although the Eighth Circuit stated that it was adopting the conservative approach to foreign antisuit

injunctions, it failed to acknowledge that the circuits endorsing this approach are themselves divided as to what factors may be considered. The First, Second, and District of Columbia Circuits endorse the "traditional version" of the conservative approach, which was first articulated by the District of Columbia Circuit in *Laker Airways*. *See Quaak*, 361 F.3d at 18.

Unlike the standard applied by the Eighth Circuit here, the traditional version of the conservative approach gives weight to equitable considerations in determining whether a foreign antisuit injunction is warranted. *See Laker Airways*, 731 F.2d at 927 ("The equitable circumstances surrounding each request must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice."); *accord Karaha*, 2007 WL 2537466 at *6 ("whether the foreign action threatens the enjoining forum's jurisdiction or its strong public policies" should be accorded "greater significance," but not to the exclusion of concern for whether the foreign litigation would "be vexatious," "prejudice other equitable considerations," or "result in delay, inconvenience, expense, inconsistency, or a race to judgment.") (internal quotation marks omitted); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2nd Cir. 1987) (directing courts to consider equitable factors in determining whether foreign antisuit injunction should issue).

By contrast, the Third, Sixth—and now Eighth—Circuits do not evaluate equitable considerations in assessing foreign antisuit injunctions. In fact, although the Eighth Circuit conceded that the ruling below "understandably is objectionable to Goss" because it "effectively nullif[ies] the remedy Goss

legitimately procured in the United States courts," it did not give any weight to this injustice. (App., *infra*, 25a.)

The circuits applying the "traditional version" of the conservative approach have rejected the more restrictive version endorsed by the Eighth Circuit here as being "inflexible." *Quaak*, 361 F.3d at 18. The First Circuit, for example, criticized the restrictive version of the conservative approach as too narrow because the approach considered "preservation of jurisdiction and protection of important national policies" as the *only* justifications sufficient to support the issuance of an antisuit injunction, thereby excluding the equitable factors that play a role in the traditional conservative approach. *Id.*

A third group of circuits undertakes an entirely different analysis. The Fifth, Seventh, and Ninth Circuits have adopted a so-called "liberal approach"[10] that gives little weight to international comity, holding that a court may enjoin any "vexatious and duplicative" foreign proceeding. *See Kaepa*, 76 F.3d at 626-28 (emphasizing "the need to prevent vexatious or oppressive litigation" and declining to require district court to "genuflect before a vague and omnipotent notion of comity every time it must decide whether to enjoin a foreign action"); *Allendale Mut. Ins. Co. v. Bull Data Sys. Inc.*, 10 F.3d 425, 431-32 (7th Cir. 1993) (rejecting the "strict" views that "presume a threat to international comity whenever an injunction is sought against litigating in a foreign court," instead

[10] The term "liberal" refers to the willingness of a federal court to protect its jurisdiction and judgment by entering an injunction under established precedents of this Court (*see, infra*, § III), without deferring to concepts of international comity.

of demanding evidence "that comity could be impaired by such an injunction"); *E. & J. Gallo Winery, v. Andina Licores S.A.*, 446 F.3d 984, 990-95 (9th Cir. 2006) (error for district court to "conclude[] it was trumped by the doctrine of comity" in declining to issue foreign antisuit injunction); *accord Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981). These circuits would not have placed the heavy emphasis on comity that led the Eighth Circuit to reverse the injunction barring TKS from clawing back the federal courts' final judgment.

The courts of appeals' decisions highlight the depth of the three-way division among nine circuits concerning the level of deference to accord comity. This case presents the Court with an appropriate vehicle to resolve this conflict and clarify the law on this important and recurring issue.

2. Further Confusion Exists Among The Circuits Concerning Which Standard To Apply To Foreign Suits Initiated After Final U.S. Judgments.

The Eighth Circuit's decision also creates additional conflict among the circuits over the weight to be accorded to comity once a final judgment is entered in the United States. Other circuits have held that once a U.S. court enters a final judgment, comity carries less weight, and the courts' primary focus should be on protecting their final judgments from relitigation abroad. *E.g., Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004) ("where one court has already reached a judgment—on the same issues, involving

the same parties—considerations of comity have diminished force"); *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, 2002 WL 31907194 (2d Cir. Dec. 31, 2002) ("'a more lenient standard' [for an antisuit injunction] prevails once judgment has been entered") (citation omitted); *Laker Airways*, 731 F.2d at 928 n.53 ("There is less justification for permitting a second action after a prior court has reached a judgment on the same issues."); *cf. Karaha*, 2007 WL 2537466 at *7 (under traditional version of conservative approach, equitable consideration of finality "will tend to weigh in favor of an anti-foreign-suit injunction").

In direct conflict with these other circuits, the Eighth Circuit held that because the judgment was final and satisfied, concerns about protecting the judgment were insufficient to outweigh comity. (App., *infra*, 26a.) Thus, contrary to other circuits, the Eighth Circuit perversely gave less weight to the protection of a final judgment, rather than more.

Review is warranted in this case to resolve the widespread circuit split regarding the standards for issuing foreign antisuit injunctions, the level of deference to afford international comity, and how this analysis applies where, as here, the foreign action at issue occurs after final judgment in the United States.

II. THE CONFLICTS AMONG THE CIRCUITS IMPLICATE IMPORTANT AND RECURRING ISSUES OF FEDERAL LAW AND JURISDICTION.

The Eighth Circuit's decision permits what the district court accurately described as a "frontal assault on . . . the federal judiciary as a whole." If, as the Eighth Circuit held, federal courts have no power to protect their judgments from being nullified once the judgments are paid, the courts' ability to fulfill their essential function is open to attack from many directions, foreign and domestic.

A. Allowing The Lower Court's Judgment To Stand Would Have A Serious And Harmful Impact On The Enforcement Of U.S. Law And The Protection Of U.S. Judgments.

The disagreements among the courts of appeals as to whether federal courts may protect their final judgments from nullification or relitigation in foreign courts have profound implications for the U.S. economy and the rule of law. This is especially true in light of the increasing expansion of international trade and the prevalence of multinational companies doing business in the United States. The Eighth Circuit's decision allowing a litigant to completely claw back a final U.S. judgment gives a green light to foreign firms and countries to undermine any U.S. law they find objectionable, even where the prohibited conduct occurs entirely within the United States. This reasoning threatens to create a dual system of justice in which international firms can escape ultimate

liability from laws that U.S. citizens and domestic firms are bound to obey.

The adverse consequences of the Eighth Circuit's ruling to the integrity of the U.S. legal system are enormous. For example, the United States is the only country in the world that authorizes treble damages to deter statutory violations such as price fixing, monopolization, and racketeering. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167-168 (2004). Many nations prohibit treble damage awards and have passed legislation banning the enforcement of foreign multiple damage awards.[11] The holding below, that federal courts' hands are tied in preventing a foreign litigant from filing a clawback action, will encourage these same nations to enact and utilize clawback statutes, the most extreme form of retaliatory legislation. That would undermine U.S. antitrust policy by effectively nullifying federal civil antitrust enforcement against international cartels operating in the United States. RICO judgments against foreign actors likewise could be rendered meaningless.

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[11] See, e.g., Kevin O'Malley, *Notes & Comments, Does U.S. Antitrust Jurisdiction Extend to Claims of Independent/Dependent Foreign Injury?*, 20 TEMP INT'L & COMP. L.J. 219, 236 (Spring 2006) (noting foreign nations' *amici* briefs in *Empagran* case; explaining that foreign disdain for treble damage awards has led to enactment of enforcement-blocking legislation); James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395, 417 (Spring 1983) (commenting on uniform foreign hostility to treble damage awards resulting in enforcement-blocking legislation).

Clawback statutes have already been enacted based on foreign hostility to the perceived extraterritorial application of U.S. laws. The United Kingdom's Protection of Trading Interests Act ("PTIA"), for example, includes a provision allowing the clawback of the multiple portion of a U.S. damages judgment. *See* PTIA, 1980, c. 11, § 6; *see also* Danaher, *supra*, 12 LAW & POL'Y INT'L BUS. at 948. Canada's Foreign Extraterritorial Measures Act ("FEMA") likewise permits the clawback of antitrust judgments from foreign countries—notably, the United States—that the Canadian Attorney General deems to be adverse to Canada's interests. *See* FEMA, R.S.C., ch. F-29, § 9 (1985), amended by 1996 R.S.C., ch. 28. (Can.).

The adverse impact of the Eighth Circuit's decision is not limited to U.S. antitrust enforcement. It predictably will encourage foreign clawback legislation aimed at other important but internationally controversial aspects of our judicial system, including punitive damage awards, liberal discovery, and enhanced damages in patent infringement and other intellectual property suits. Federal judgments based on any of these laws or procedures are vulnerable to nullification under the holding in this case.

Failing to protect U.S. judgments from foreign clawbacks also threatens to create a dual system of justice that disadvantages U.S. defendants. Many foreign and multinational firms will effectively be immunized from liability for illegal or anticompetitive conduct within the United States, while U.S. firms and citizens are held accountable for the same conduct. The Eighth Circuit's ruling would permit foreign firms to do business in the United States, violate U.S.

law, and then nullify virtually any U.S. judgment under a foreign clawback statute.

This issue is not limited to the use of foreign clawback statutes, but is a recurring issue where litigants file other statutory or common law claims in foreign courts to nullify final U.S. judgments. *See, e.g., Karaha*, 2007 WL 2537466 at *4 (defendant attempted to annul arbitration award by filing Cayman Islands action alleging that award had been procured through fraud); *Triton Container Int'l Ltd. v. Di Gregorio Navegacao Ltda.*, 440 F. 3d 1137, 1138 (9th Cir. 2006) (defendants filed Brazilian action against plaintiff concerning same underlying facts, after money judgment rendered against them); *Canon Latin America Inc. v. Lantech (CR), S.A.*, 453 F. Supp. 2d 1357, 1364-66 (S.D. Fla. 2006) (defendant filed suit in Costa Rica in an "evasive" effort to avoid forum selection clause); *Commercializadora Portimex S.A. de CV v. Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645, 648 (E.D. La. 2005) (plaintiff filed new foreign suit on same facts two and one-half years after district court rendered final judgment against plaintiff); *Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co.*, 167 F. Supp. 2d 743, 744 (E.D. Pa. 2001) (plaintiffs filed damages claims against defendant in foreign court four years after district court entered judgment against plaintiffs on same claims).

As set forth above, nine circuits are now evenly divided on the basic test to employ to decide these important and recurring issues. Review by this Court is warranted to resolve the widespread disagreement and confusion among the circuits on these issues.

B. The Decision Below Will Have An Unsettling Impact On Federal Courts' Jurisdiction To Protect Final Judgments From Collateral Attack In State Court.

The conflict between the Eighth Circuit in this case and the Second Circuit in *Karaha* also directly impacts the question of whether federal courts have jurisdiction to protect their final judgments from nullification by subsequent proceedings in state court. If, as the Eighth Circuit held, federal courts lack jurisdiction to protect a judgment once it is paid, the necessary implication is that the federal courts are powerless to prevent state court proceedings aimed at relitigating or nullifying a satisfied federal judgment.

This, too, is a frequently recurring issue. Federal courts are routinely called upon to exercise ancillary jurisdiction to discharge their obligation to protect final judgments. *See, e.g., Next Level Commc'ns LP v. DC Commc'ns Corp.*, 179 F.3d 244, 248-50 (5th Cir. 1999) (affirming antisuit injunction to "protect and effectuate" final money judgment, notwithstanding fact that satisfaction of judgment already had been filed); *Cole v. United States*, 657 F.2d 107, 110 (7th Cir. 1981) (affirming antisuit injunction barring plaintiff from relitigating in state court issue that had been resolved by district court); *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 90 (5th Cir. 1977) (affirming antisuit injunction barring state court action that was "frontal attack" on district court's final judgment); *Samuel C. Ennis & Co. v. Woodmar Realty Co*, 542 F.2d 45, 48 (7th Cir. 1976) (affirming injunction of state court action that would have "nullified" final bankruptcy order); *Lee v. Termi-*

nal Transp. Co., 282 F.2d 805, 806 (7th Cir. 1960) (upholding permanent antisuit injunction to prevent plaintiffs from pursuing prejudgment interest in state court after federal court awarded a judgment that did not include such interest); *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 950 (10th Cir. 1952) (antisuit injunction properly issued to protect 25-year-old final decree from relitigation because "jurisdiction of the court to entertain such a supplemental proceeding is not lost by the intervention of time or the discharge of res from the court").

The Eighth Circuit's decision ordains that a federal court loses subject matter jurisdiction to enjoin a subsequent proceeding the moment the federal judgment is paid. (App., *infra*, 22a) ("[T]he judgment now is rendered, paid, and satisfied. . . . Neither the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction to enjoin TKS under these circumstances.") It necessarily follows that federal courts cannot take steps to protect or effectuate their final judgments, at least with regard to satisfied money judgments, regardless of whether the subsequent attack comes in a foreign or state court.

Widespread disagreement and confusion exists among the circuits with regard to the power of federal courts to protect their final judgments from nullification by foreign or state courts. Such issues are recurring and of great practical importance to U.S. litigants and to the integrity of the U.S. judicial system. Only this Court's intervention can end these conflicts and prevent serious harm to the U.S. legal system that will otherwise result.

III. THE EIGHTH CIRCUIT'S APPLICATION OF THIS COURT'S PRECEDENTS CONCERNING ANCILLARY AND SUPPLEMENTAL JURISDICTION IS CLEARLY ERRONEOUS.

This Court has long held that federal courts have "ancillary" jurisdiction "in aid of and to effectuate [a] prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect." *Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937); *see* 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3013 (2d ed. 1987). This ancillary jurisdiction "follows that of the original suit," and may be invoked after judgment in a supplemental proceeding. *Dugas*, 300 U.S. at 428. Because jurisdiction over the supplemental proceeding follows that of the original suit, "[n]o independent basis for federal jurisdiction is necessary in such an action." *Samuel C. Ennis*, 542 F.2d at 48 (*citing Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934)). Rather, ancillary jurisdiction extends to claims having a factual and logical relationship to the primary suit and arises from "the practical need 'to protect legal rights or effectively resolve an entire, logically intertwined lawsuit.'" *Peacock*, 516 U.S. at 355 (*quoting Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376-77 (1978)).

The Eighth Circuit's conclusion that the courts have no power to prevent a losing litigant from clawing back in a foreign court a final judgment is inconsistent with this established doctrine. As the Court explained in *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880), courts have a duty to ensure that litigants retain "the

substantial fruits of a judgment rendered in their favor." Thus, federal courts have jurisdiction to enforce and protect a judgment "no matter how or when [a party] may attempt to evade it or escape its effect." *Id.*

Ancillary jurisdiction is now codified by 28 U.S.C. § 1367(a), which provides that federal courts have jurisdiction over "all other claims that are so related to the claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III." Under this doctrine, a federal court has ancillary jurisdiction to enable it to "function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994).

The district court also had jurisdiction over the antisuit injunction under the All Writs Act, which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). A court has the power to issue such commands under the All Writs Act as appropriate to "effectuate and prevent the frustration of orders it has previously issued." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

In *Dugas*, 300 U.S. at 428, this Court upheld an antisuit injunction to protect the integrity of a final monetary judgment. There, an insurance company filed a federal interpleader action to resolve its liability among numerous claimants on a bond. The district court's final judgment distributed the proceeds of the

bond to claimants on a *pro rata* basis. *Id.* at 420. Nearly two years after the proceeds of the bond were fully distributed—satisfying the judgment and discharging the insurer from further liability—one of the claimants filed a state court action that would have resulted in additional liability against the insurer. Although the insurer's request for an antisuit injunction came two years after satisfaction of the final judgment, this Court held that federal jurisdiction was "free from doubt." *Id.* at 428.

In *Dietzsch*, 103 U.S. at 497, this Court found that the district court could enforce its final judgment by enjoining a state court action that would have put the winning federal plaintiffs "in precisely the same plight as if the judgment of the [federal court] had been against them, instead of for them." The federal judgment had previously awarded the *Dietzsch* plaintiffs ownership of disputed property.[12] The defendants filed the subsequent state court action to recover a replevin bond that the plaintiffs had posted in the state court before removal to stand in place of the disputed property. *Id.* This Court found that an injunction was appropriate to prevent the "defeated party from wresting the replevied property" from the winning plaintiffs, notwithstanding the fact that the federal action was complete and its judgment effectuated. *Id.* at 495-97.

Absent the power to enforce final judgments, "the judicial power would be incomplete and entirely inadequate for the purposes for which it was conferred

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[12] *See Kern v. Huidekoper*, 103 U.S. 485 (1880) (establishing final judgment in favor of plaintiffs on ownership of property).

by the Constitution." *Riggs*, 73 U.S. at 187. This is true regardless of whether a losing federal litigant seeks to undermine a final judgment through a subsequent state law claim or a foreign clawback lawsuit. To hold otherwise "would require the American judges to abdicate their oath of office to uphold the laws of the United States." *Laker Airways*, 731 F.2d at 941 n.121.

This case presents the Court with an ideal vehicle to clarify the bounds of federal jurisdiction to protect final judgments from subsequent nullification by a losing litigant, and to overturn a court of appeals decision that is flatly inconsistent with this Court's governing precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2007

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-2658

Appeal from the United States District Court for the Northern District of Iowa

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Goss International Corporation, formerly known as Goss Graphic Systems, Inc., a Delaware corporation,

Plaintiff/Appellee,

v.

Man Roland Druckmaschinen Aktiengesellschaft, a German corporation; Man Roland, Inc., a Delaware corporation; Koenig & Bauer Aktiengesellschaft, a German corporation; KBA North America, Inc., a Delaware corporation,

Defendants,

Tokyo Kikai Seisakusho, Ltd., a Japanese corporation; TKS (U.S.A.), Inc., a Delaware corporation,

Defendants/Appellants,

Mitsubishi Heavy Industries, Ltd., a Japanese corporation; MLP U.S.A., Inc., a Delaware corporation,

Defendants,

The Government of Japan,

Amicus on Behalf of Appellants.

Submitted: September 28, 2006
Filed: June 18, 2007 (corrected 7/31/07)

Before RILEY, SMITH, and BENTON, Circuit Judges.

RILEY, Circuit Judge.

On December 3, 2003, a jury found Japanese-based Tokyo Kikai Seisakusho, Ltd. (TKS), liable to Goss International Corporation (Goss), under the Antidumping Act of 1916 (the 1916 Act), 15 U.S.C. § 72 (repealed 2004), which made it unlawful for foreign persons to sell imported articles within the United States at a price substantially less than the actual market value or wholesale price at the time of exportation, with the intent of destroying or injuring an industry in the United States. The judgment, inclusive of statutory treble damages, attorney fees, and costs, amounted to more than $35,000,000.

During the pendency of TKS's appeal, Congress prospectively repealed the 1916 Act. See Miscellaneous Trade & Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597 (2004).

Shortly thereafter, the Japanese government passed "The Special Measures Law concerning the Obligation to Return Profits Obtained pursuant to the Antidumping Act of 1916 of the United States, etc., Law No. 162, 2004[1]" (Special Measures Law), a clawback statute[2] allowing Japanese nationals to sue for the recovery of any judgment entered against them under the 1916 Act.

On June 15, 2006, the district court granted Goss's motion for preliminary injunction, prohibiting TKS from filing suit in Japan under the Special Measures Law. On June 19, 2006, TKS paid the judgment in full, and the district court entered a satisfaction of judgment on June 21, 2006. On June 23, 2006, TKS filed this interlocutory appeal. In light of the changed circumstances since the district court entered its preliminary injunction, we vacate the district court's preliminary injunction.

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[1] Amerika gasshuukoku no 1916 nen no han futou renbai hou ni motoduki uketa rieki no henkan gimu tou ni kansuru tokubetsu sochi hou [Special Measures Law], Law No. 162 of 2004.

[2] A clawback statute is a countermeasure that enables defendants who have paid a multiple damage judgment in a foreign country to recover the multiple portion of that judgment from the plaintiff. See generally, Joseph E. Neuhaus, Note, Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law, 81 Colum. L. Rev. 1097, 1097-98 (1981) (citing the Protection of Trading Interests Act, 1980, c.11, § 5 (U.K.)); Joseph P. Griffin, United States Antitrust Laws and Transnational Business Transactions: An Introduction, 21 Int'l Law. 307, 327 (1987) (discussing clawback legislation enacted by the United Kingdom, Australia, and Canada that allows companies which have paid treble damages under United States antitrust law judgments to "sue the successful plaintiff in the local courts for a return of all or a portion of the damages").

I. BACKGROUND

Goss and TKS both manufacture and supply newspaper printing presses and press additions. Goss was the major manufacturer of large printing presses in the United States for more than a century and enjoyed dominance in the United States printing press market into the late 1990s. Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft (Goss I), 434 F.3d 1081, 1084-85 (8th Cir.), cert. denied, 126 S. Ct. 2363 (2006).

In the 1970s, TKS began selling its presses and press additions in the United States. By the 1980s, TKS obtained contracts with large United States newspapers, including *The Wall Street Journal*, *The Washington Post*, and the *Newark Star-Ledger*. Between 1991 and 2000, TKS began "dumping" its products, that is, selling them in the United States at prices substantially below the market value of its similar products in Japan. During that period, TKS sold $125,000,000 worth of printing press additions in the United States. Goss, on the other hand, lost contracts because customers expected Goss to lower its prices to match TKS's prices. In 2000, Goss did not make a single printing press equipment sale. See id. at 1085.

In March 2000, Goss brought a civil action against TKS alleging violations of the 1916 Act. See id. at 1087. On December 3, 2003, a jury found in Goss's favor and awarded $10,539,949 in damages. See id. at 1087-88. The district court statutorily trebled the damages, pursuant to the 1916 Act, and entered judgment against TKS in the amount of $31,619,847,

plus interest and costs. See id. at 1088. The district court also awarded $3,484,158 in attorney fees and expenses, and $681,475.05 in costs. TKS appealed.

On December 3, 2004, Congress repealed the 1916 Act. Because the repeal was prospective, it did not affect Goss's judgment. Japan considered the prospective repeal to be inconsistent with the United States's obligations under World Trade Organization (WTO) agreements.[3] Consequently, on Decem

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[3] The United States, Japan, and the European Communities (EC) are members of the WTO, which is an international trade organization established in 1995 to administer trade agreements, provide a forum for trade negotiations, and handle trade disputes between member nations. In November 1998, the EC asked the WTO's Dispute Settlement Body (DSB) to establish a dispute settlement panel because of pending litigation in the United States against EC entities under the 1916 Act. The EC argued the 1916 Act was inconsistent with WTO covered agreements, and therefore the United States breached its WTO obligations by failing to repeal the 1916 Act. Japan registered the same complaint in June 1999. The United States defended its position, insisting the trade effects of the 1916 Act were de minimis, and pointing out that in the eighty-two years since its passage, no money damages or other relief ever had been awarded under the 1916 Act. The DSB agreed to establish dispute panels to review the EC's and Japan's complaints.

In 2000, the dispute panels concluded (1) the 1916 Act violated WTO covered agreements, including the General Agreement on Tariffs and Trade 1994 (GATT), the Anti-dumping Agreement (the Agreement on Implementation of Art. VI of the GATT), and the WTO Agreement; and (2) benefits accruing to the EC and Japan under the WTO Agreement had been nullified or impaired. The panels' decisions recommended the United States "bring the 1916 Act into conformity with its obligations under the WTO Agreement." The DSB adopted the panels' decisions and authorized arbitration to determine a reasonable time period for the

(continued...)

ber 8, 2004, Japan enacted the Special Measures Law, a clawback statute authorizing Japanese corporations and/or Japanese nationals to sue in Japanese courts for recovery of the full amount of any judgment, plus interest, attorney fees and costs, awarded under the 1916 Act. Special Measures Law, art. 3, 6. The Special Measures Law holds any wholly-owned parent companies and subsidiaries of the party that prevailed under the 1916 Act jointly and severally liable for the clawback judgment. Id. Goss Graphic Systems Japan (Goss Japan), which is located in Tokyo, is a wholly-owned subsidiary of Goss.

On November 24, 2004, by stipulation of the parties,

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[3] (...continued)
United States to implement the provisions of the panels' decisions.

The United States requested extensions to the implementation period, explaining more time was necessary for Congress to enact legislation repealing the 1916 Act. Japan and the EC agreed to the extensions on the condition "the proposal and the draft Bill specifically addressed the repeal of the Act and the effect of the repeal were applicable to all actions pending on the date of enactment of the repeal Act, and to all actions filed after the date of enactment." However, in June 2002, the EC and Japan reactivated arbitration when a bill was introduced in Congress providing for the *prospective* repeal of the 1916 Act.

In February 2004, the WTO arbitrators approved the suspension of concessions to the United States. The suspension allowed for, among other things, a level of nullification equal to the total amount of any final judgments and/or settlement claims awarded under the 1916 Act. See generally World Trade Organization Appellate Body Reports, 2000, United States–Anti-Dumping Act of of 1916, http://www.wto.org/english/tratop_e/ab_reports_e.htm (last visited June 12, 2007).

TKS agreed not to file a lawsuit under the Special Measures Law until after TKS exhausted its appeal in the antidumping action. The stipulation also required TKS to provide Goss fourteen days' notice of its intention to pursue a remedy under the Special Measures Law. On January 26, 2006, our court affirmed the jury verdict and damages award in the antidumping action, see Goss I, 434 F.3d at 1084, and on June 5, 2006, the United States Supreme Court denied TKS's petition for writ of certiorari, see Tokyo Kikai Seisakusho, Ltd. v. Goss Int'l Corp., 126 S. Ct. 2363 (2006).

The same day the Supreme Court denied TKS's petition, TKS notified Goss of its intent to file suit under the Special Measures Law. Goss filed a motion for preliminary and permanent antisuit injunction to prevent TKS "from usurping the Court's jurisdiction and frustrating the Court's judgment." On June 15, 2006, the district court issued a preliminary antisuit injunction enjoining TKS from filing suit under the Special Measures Law. Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd. (Goss P.I.), 435 F. Supp. 2d 919, 931 (N.D. Iowa 2006). On June 19, 2006, TKS paid the judgment in full, and the district court entered a satisfaction of judgment on June 21, 2006. On August 9, 2006, pursuant to TKS's motion, the district court terminated TKS's bond stating, "[t]he supersedeas bond, which was posted to protect the original judgment of the court, cannot be held in a speculative fashion to protect a possible award for attorney fees and costs spent on a possible decision granting a permanent anti-suit injunction that may possibly be appealed."

II. DISCUSSION

A. Proper Standard for Issuance of a Foreign Antisuit Injunction

The propriety of issuing a foreign antisuit injunction is a matter of first impression for our circuit. Other circuits having decided the issue agree that "federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits." Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996); see Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984) (citing Cole v. Cunningham, 133 U.S. 107, 116-17 (1890)). The circuits are split, however, on the level of deference afforded to international comity in determining whether a foreign antisuit injunction should issue.

On December 3, 2004, Congress repealed the 1916 Act, specifying the repeal "shall not affect any action under [the 1916 Act] that was commenced before the date of the enactment of this Act and is pending on such date." Pub. L. No. 108-429, § 2006(a)-(b), 118 Stat. 2434, 2597.

The First, Second, Third, Sixth, and District of Columbia Circuits have adopted the "conservative approach," under which a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity. See Quaak v. Klynveld

Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004) (adopting the "conservative approach," which questions "whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy" and "accords appreciably greater weight to considerations of international comity"); see also Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 161 (3d Cir. 2001) (same); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (same); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35-37 (2d Cir. 1987) (same); Laker Airways, 731 F.2d at 926-34 (same). Under the conservative approach, "[c]omity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest of cases." Gau Shan Co., 956 F.2d at 1354 (citing Laker Airways, 731 F.2d at 927); see also China Trade, 837 F.2d at 35-36 (holding an antisuit injunction "effectively restricts the jurisdiction of the court of a foreign sovereign," thus, such orders "should be used sparingly, and should be granted only with care and great restraint" (internal quotation marks and citations omitted)).

In contrast, the Fifth and Ninth Circuits follow the "liberal approach," which places only modest emphasis on international comity and approves the issuance of an antisuit injunction when necessary to prevent duplicative and vexatious foreign litigation and to avoid inconsistent judgments. See Kaepa, Inc., 76 F.3d at 627-28 (concluding a district court does not abuse its discretion by issuing an antisuit injunction when litigation of the same action in a foreign forum "would result in inequitable hardship and tend to frustrate and delay the speedy and efficient determination of

the cause" (internal quotations omitted)); see also E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989-91 (9th Cir. 2006) (applying the Fifth Circuit's standard for issuance of an antisuit injunction (citing Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 364 n.19, 366-67 (5th Cir. 2003))). The Seventh Circuit similarly has indicated its agreement with the liberal approach. See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 430-31 (7th Cir. 1993).

Under either the conservative or liberal approach, "[w]hen a preliminary injunction takes the form of a foreign antisuit injunction, [courts] are required to balance domestic judicial interests against concerns of international comity." Karaha Bodas Co., 335 F.3d at 366. We agree with the observations of the First Circuit that the conservative approach (1) "recognizes the rebuttable presumption against issuing international antisuit injunctions," (2) "is more respectful of principles of international comity," (3) "compels an inquiring court to balance competing policy considerations," and (4) acknowledges that "'issuing an international antisuit injunction is a step that should 'be taken only with care and great restraint' and with the recognition that international comity is a fundamental principle deserving of substantial deference." Quaak, 361 F.3d at 18 (quoting Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969)). Likewise, we agree with the Sixth Circuit's observation the liberal approach "conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudi-

cate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." Gau Shan Co., 956 F.2d at 1355.

Although comity eludes a precise definition, its importance in our globalized economy cannot be overstated. Compare Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"), with Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512, 1519 n.10 (11th Cir. 1994) (noting commentators have defined comity using terms such as, "courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or consideration of high international politics concerned with maintaining amicable and workable relationships between nations" (internal quotation marks omitted)). Indeed, the "world economic interdependence has highlighted the importance of comity, as international commerce depends to a large extent on 'the ability of merchants to predict the likely consequences of their conduct in overseas markets.'" See Quaak, 361 F.3d at 19 (quoting Gau Shan Co., 956 F.2d at 1355)). We also note, the Congress and the President possess greater experience with, knowledge of, and expertise in international trade and economics than does the Judiciary. The two other branches, not the Judiciary, bear the constitutional duties related to foreign affairs. For these reasons, we join the majority of our sister circuits and adopt the conservative approach in determining whether a foreign antisuit injunction should issue.

B. Application of the Standard

1. District Court's Decision

In the absence of guidance from our circuit or the Supreme Court regarding the standard for issuing an antisuit injunction, the district court noted the split of authority and concluded under either the conservative or the liberal approach, "it is settled that considerations of comity have diminished force when, as here, one court has already reached judgment." Goss P.I., 435 F. Supp. 2d at 928 (citing Paramedics Electromedicina Comercial, Ltda. v. G.E. Med. Sys. Info. Techs., Inc., 369 F.3d 645, 655 (2d Cir. 2004)). In reaching this conclusion, the district court relied on the seminal case of Laker Airways Ltd. v. Sabena, Belgian World Airlines, wherein the Court of Appeals for the District of Columbia Circuit made an exhaustive inquiry into the propriety of issuing a foreign antisuit injunction. See Laker Airways, 731 F.2d at 909-59.[4]

As an initial matter, the district court noted the parties agreed the district court had equitable power to issue a foreign antisuit injunction to enjoin a party

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[4] While applying our circuit's traditional four-factor preliminary injunction analysis under Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc), the district court recognized the awkward fit of such an analysis in cases involving foreign antisuit injunctions. See Goss P.I., 435 F. Supp. 2d at 926 n.7. We agree. The analysis for issuing a foreign antisuit injunction primarily should focus on (1) whether an action in the foreign jurisdiction prevents United States jurisdiction or threatens a vital United States policy, and (2) whether the domestic interests outweigh concerns of international comity. We focus our review, therefore, upon the district court's analysis of these particular factors.

before it from pursuing litigation in a foreign forum, and "the All Writs Act, 18 U.S.C. § 1651, empowers the court to issue an injunction barring TKS from filing suit under the Japanese Special Measures Law." Goss P.I., 435 F. Supp. 2d at 924-25.

The district court next determined TKS's proposed invocation of the Special Measures Law was "a direct attack on [the] court's judgment in favor of Goss and a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole," an assault instituted "'for the sole purpose of terminating' [the] court's judgment in Goss's favor." Id. at 929 (quoting Gau Shan Co., 956 F.2d at 1356 (quoting Laker Airways, 731 F.2d at 915)). The district court reasoned TKS's proposed litigation was "clearly vexatious and oppressive" because TKS effectively sought to terminate the district court's judgment in favor of Goss, and "thereby in a single filing attempting to undo six years of federal court litigation." Id. The district court acknowledged that the issuance of an antisuit injunction "would be deeply offensive to the Japanese government" and "may have international repercussions," but nonetheless determined "its interest in protecting the integrity of its judgments and jurisdiction outweighs concerns over international comity." Id. The district court concluded:

> The fact that the legislative and executive branches were aware of this court's judgment and deliberately chose *not* to undo it through a retroactive repeal of the 1916 Act must inform the weight this court must give to international comity in this case. It is not the province of this court or the federal judiciary in general to rewrite the foreign policy of the United

> States government, as expressed by the legislative and executive branches of government.

Id. at 930.

Thus, the district court found the factors weighed in Goss's favor and issued a preliminary injunction. Id. at 931. In doing so, the district court stressed the order enjoined only TKS, not the Japanese government or judiciary, from availing itself of the Special Measures Law until the district court determined the merits of Goss's permanent injunction motion.

On appeal, TKS argues, because the judgment has been paid, a Japanese suit under the Special Measures Law would not threaten the jurisdiction of the United States. TKS further argues the United States would be deeply offended if a foreign court granted an antisuit injunction under similar circumstances. TKS concedes a United States court may properly enjoin a party from seeking an order in a foreign court that would deprive the United States court of jurisdiction over a claim properly before it, but a United States court may not prevent a foreign national from taking recourse to its own courts for relief under a foreign statute that does not interfere with the jurisdiction of the United States courts. TKS further contends, under the district court's rationale, all actions under foreign clawback statutes are subject to injunction because all foreign clawback statutes would deprive United States courts of jurisdiction. Finally, TKS claims no vital American policy is being protected by the antisuit injunction.

2. Standard of Review

Our standard of review over the issuance of a preliminary injunction is a familiar one. "We review the District Court's material factual findings for clear error, its legal conclusions de novo, and the court's equitable judgment–the ultimate decision to grant the injunction–for an abuse of discretion." Heartland Acad. Cmty. Church v. Waddle, 335 F.3d 684, 689-90 (8th Cir. 2003).

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994) (quotation omitted).

3. Goss's Antisuit Injunction

At the outset of our review, we acknowledge the district court's unenviable task to navigate the uncharted waters of foreign antisuit injunctions. We begin our review with a discussion of the instructive Laker Airways case relied upon by the district court. Laker Airways (Laker) brought an antitrust action against four foreign airlines and four domestic corporations in the United States District Court for the District of Columbia. Laker Airways, 731 F.2d at 917. Shortly after Laker filed the lawsuit, the foreign defendants filed an action in the United Kingdom's High Court of Justice, requesting a declaration of non-

liability and an injunction to prevent Laker from pursuing remedies in the United States courts under United States antitrust laws. Id. at 918. The requested relief stemmed from the alleged incompatibility between United States antitrust laws with their consequent treble damages on the one hand, and the Bermuda II Treaty and the British Protection of Trading Interests Act on the other. Id. The United Kingdom's High Court of Justice granted the injunction, which effectively terminated Laker's pending United States litigation as to the four foreign defendants. Id. In the district court, Laker successfully enjoined the remaining domestic defendants and two foreign airline defendants in a second antitrust action from filing any action in a foreign court that "would interfere with the district court's jurisdiction over the matters alleged in the complaint." Id. at 918-19.

On appeal, the Laker Airways defendants argued "the injunction was unnecessary to protect the district court's jurisdiction and violate[d] their right to take part in the 'parallel' actions commenced in the English courts." Id. at 921. A divided panel affirmed the decision, concluding an injunction by the United Kingdom's High Court of Justice would have stripped the United States court of control over Laker's pending litigation. Id. at 955-56. The court did not reach this conclusion without much deliberation, first recognizing "the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." Id. at 926-27. The

court cautioned that while foreign antisuit injunctions only operate on the parties within the court's jurisdiction, "they effectively restrict the foreign court's ability to exercise its jurisdiction." Id. at 927.

In deciding the propriety of issuing an antisuit injunction, the Laker Airways court established factors to be considered, which included protecting United States jurisdiction, preserving important United States public policies, and balancing domestic interests with the principles of international comity. Id. at 926-45. The court recognized the futility of an interest balancing test in determining prescriptive jurisdiction because the "courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law." Id. at 948. While acknowledging the domestic courts' obligation "to apply international law and foster comity," the court conceded that, when in doubt, "national interests will tend to be favored over foreign interests." Id. at 951. The court concluded, to protect properly the jurisdiction of the United States over the prescriptive jurisdiction of its United States antitrust laws, the district court acted within its discretion by enjoining the defendants from pursuing an injunction in the United Kingdom's High Court of Justice. Id. at 955-56. The court recognized, however, along with this act of preserving its own jurisdiction ran "the risk that counterinjunctions or other sanctions will eventually preclude Laker from achieving any remedy, if it is ultimately entitled to one under United States law. In

either case the policies of both countries are likely to be frustrated at the cost of substantial prejudice to the litigants' rights." Id. at 953.

As in Laker Airways, most cases dealing with foreign antisuit injunctions involve simultaneous litigation in both United States and foreign courts. In Gau Shan Co. v. Bankers Trust Co., for example, a borrower brought an action in a United States district court against its lender for fraud in connection with a loan note. Gau Shan Co., 956 F.2d at 1352. When the lender tried to file an action in Hong Kong against the borrower for failure to pay the loan note, the United States court granted the borrower's motion for a foreign antisuit injunction. Id. The Sixth Circuit reversed, holding a parallel suit did not threaten United States jurisdiction and international comity precluded the issuance of an antisuit injunction. Id. at 1355-59. The court reasoned, "The possibility that a holding of a Hong Kong court might permit [the lender] to gain control of [the borrower] is not a threat to the jurisdiction of the United States courts; rather, it is merely a threat to [the borrower]'s interest in prosecuting its lawsuit." Id. at 1356. Similarly, in China Trade & Dev. Corp. v. M.V. Choong Yong, the Second Circuit reversed the issuance of an antisuit injunction, concluding parallel litigation in the United States and Korea concerning a Korean corporation's liability did not frustrate an important United States policy or threaten the jurisdiction of the United States courts. China Trade, 837 F.2d at 34.

Other courts have upheld the issuance of a foreign antisuit injunction in the face of parallel litigation.

For example, in Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, when investors filed a securities fraud class action lawsuit in a United States district court against Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren (KPMG-B), KPMG-B was also a defendant in a contemporaneous criminal action in Belgium. Quaak, 361 F.3d at 14. The class action plaintiffs sought documents from KPMG-B, but KPMG-B claimed Belgian law prohibited KPMG-B from releasing the information. Id. at 14-15. Thereafter, KPMG-B instituted an action in the Belgian judicial system seeking to enjoin the class action plaintiffs from "taking any step" toward the discovery requests and to impose substantial penalties on parties pursuing discovery procedures. Id. The class action plaintiffs countered this move by filing a motion in the United States action and obtaining a foreign antisuit injunction against KPMG-B to prevent KPMG-B from pursuing the Belgian injunctive action. Id. On appeal, the First Circuit affirmed the injunction, agreeing with the district court that the character of the foreign action, the public policy of protecting investors against fraud, and the need to protect the court's jurisdiction all counterbalanced comity concerns under the peculiar circumstances of the case. Id. at 20.[5]

The case before us does not fit within the category of cases in which foreign antisuit injunctions have been

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[5] Foreign antisuit injunctions also have been dealt with in the context of compelling arbitration, see Paramedics Electromedicina, 369 F.3d at 648-49, and enforcing arbitration agreements, see Karaha Bodas Co., 335 F.3d at 359-60.

considered. We do not believe the rationale of those cases compels an injunction in the present case.

First, although the All Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the Act does not create an independent source of federal jurisdiction. Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 31 (2002) (quoting 28 U.S.C. § 1651(a) and declaring the All Writs Act does not establish the original jurisdiction to support removal jurisdiction); see Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 333-34 (2d Cir. 2006) (rejecting the district court's assertion that an injunction issued pursuant to the All Writs Act provided the court with subject matter jurisdiction concluding, "[t]o hold otherwise would make mincemeat of the limited grants of jurisdiction bestowed upon us"); Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 413 (2d Cir. 2002) (noting the All Writs Act, while not conferring an independent basis of jurisdiction, "'provides a tool courts need in cases over which jurisdiction is conferred by some other source'" (quoting United States v. Tablie, 166 F.3d 505, 507 (2d Cir. 1999) (per curiam))); Phillips Beverage Co. v. Belvedere S.A., 204 F.3d 805, 806 (8th Cir. 2000) (concluding the district court had continuing jurisdiction, therefore the All Writs Act provided the district court the authority to prevent a party from making an end run around the district court's previous denial of interim relief by enjoining the party from seeking relief elsewhere); Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932, 937 (9th

Cir. 1993) (concluding the All Writs Act does not operate to confer jurisdiction upon the district court, rather the Act only aids jurisdiction the district court already possesses). In this case, at the time the district court issued the preliminary antisuit injunction, the district court clearly possessed jurisdiction over the case and parties pursuant to 28 U.S.C. § 1331, and TKS had not paid the monetary judgment. Thus, the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment. See Peacock v. Thomas, 516 U.S. 349, 356-57 (1996) ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" (quoting Riggs v. Johnson County, 73 U.S. 166, 187 (1867) ("[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.")[6]).

Now, however, the antidumping litigation has culminated: a verdict was entered for Goss, which we affirmed on appeal; TKS paid the judgment; and the district court lifted the stay of the supersedeas bond.

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[6] "Although not a base of jurisdiction, the All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act." 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3691 (3d ed. 1998). See, e.g., Sprint Spectrum, 283 F.3d at 413-14 (concluding the district court had the authority under the All Writs Act to compel a third party, without whom there would have been no underlying case or controversy, to perform the third party's contractual obligations to prevent the frustration of the district court's orders previously issued in the underlying action).

Therefore, the judgment now is rendered, paid, and satisfied. No pending litigation, other than this appeal, remains in the United States courts. Thus, the request for injunctive relief is not for the prevention of interdictory jurisdiction by Japanese courts. Instead, the United States courts are being asked to prevent TKS from seeking a remedy available solely in Japan. Neither the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction to enjoin TKS under these circumstances. See Peacock, 516 U.S. at 358 ("In determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction over proceedings that are 'entirely new and original,' or where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree." (quoting Krippendorf v. Hyde, 110 U.S. 276, 285 (1884), and Dugas v. Am. Surety Co., 300 U.S. 414, 428 (1937), respectively)).

Second, in cases involving parallel litigation in foreign countries, once one court reaches a final judgment, the role of comity for antisuit injunction purposes essentially is moot because there is no longer tension with the foreign country over *concurrent* jurisdiction. Instead, the doctrine of res judicata should apply as a defense to further litigation of the same issues. As the Laker Airways court explained, "Comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense." Laker Airways, 731 F.2d at 939.

The issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction. TKS now seeks to litigate in Japan a cause of action solely available in Japan and not previously litigated in the antidumping litigation. The issues are not the same simply because TKS's cause of action under the Special Measures Law rests on the imposition of an adverse judgment against TKS under the 1916 Act.

Third, we disagree with the district court's assertion that Congress's decision to repeal the 1916 Act prospectively, rather than retroactively, may play a role in the decision to grant a foreign antisuit injunction to protect the court's jurisdiction or an important United States policy. Nothing in the repeal of the 1916 Act, nor any principle of law (aside from the doctrines of res judicata and collateral estoppel, which are inapplicable here), confers jurisdiction upon the court to maintain authority over the parties now that judgment has been satisfied. Cf. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1013 (8th Cir. 2002) (applying the relitigation exception of the All Writs Act, which protects from future litigation, a claim or issue that relates back to a prior federal court decision). Indeed, in repealing the 1916 Act, the Committee on the Judiciary (Committee) was clearly acting in response to the WTO proceedings and the potential for retaliation against the United States for not repealing the 1916 Act. See H.R. Rep. No. 108-415, at 5 (2004). The Committee knew the European Union (EU) approved a regulation banning "the recognition and application of decisions taken under the 1916 Act within EU countries," and "allow[ing] EU-based companies and

citizens to claim damages (with interest) for any penalties associated with [the 1916 Act's] application." Id. The dissenting members of the Committee also knew the EU's "blocking" regulation provided "EC companies with a right to recover any costs incurred in 1916 Act litigation." Id. at 18.

The district court also placed too much emphasis on the impact of the Special Measures Law on United States public policy. The Special Measures Law has a onetime application: There is no pending litigation under the now-defunct 1916 Act; Goss received the only judgment ever granted under the Act; thus, the only lawsuit possible under the Special Measures Law can be brought against Goss alone. Our consideration of international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures Law, which will undoubtedly involve application of Japanese precedent and domestic policy, and the Japanese courts' own consideration of international comity. If the Japanese judiciary upholds the enforceability of the Special Measures Law, it must next determine whether jurisdiction over Goss exists to maintain the lawsuit. International comity requires us to give deference to the Japanese courts to interpret Japanese laws. Goss is not precluded from seeking affirmative defenses under Japanese law in defending itself from the countermeasure. Furthermore, the United States representative to the WTO may seek to enforce provisions of the WTO Agreement to prevent TKS from enforcing the Special Measures Law as a suspension of obligations.[7]

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[7] We have not been apprised whether the DSB found Japan's

(continued...)

We are profoundly aware a judgment in favor of TKS under the Special Measures Law would effectively nullify the remedy Goss legitimately procured in the United States courts. Although such a result understandably is objectionable to Goss, it does not threaten United States jurisdiction or any current United States policy. Cf. Gau Shan Co., 956 F.2d at 1356 (concluding the possibility a foreign court's holding might threaten the United States plaintiff's interest in prosecuting its lawsuit is not a threat to the jurisdiction of the United States courts); Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1213-14 (D.C. Cir. 1989) (holding no basis for an antisuit injunction existed because the issues litigated in the foreign court were different despite the fact that successful litigation in the foreign court would effectively overturn a decision of the United States court).

As in Laker Airways, the matter before us did not begin as an international jurisdictional standoff.[8]

(...continued)
Special Measures Law consistent with the WTO's suspension of concessions to the United States or whether the Special Measures Law otherwise has been challenged before the WTO. See supra n.3.

[8] The Laker Airways court discussed the tension between the antitrust laws of the United States and the United Kingdom, and the potential ramifications under the Protection of Trading Interests Act, 1980, c.11, § 5 (U.K.), a British clawback statute, which provides protection from multiple damage awards imposed under the laws of countries outside the United Kingdom. See Laker Airways, 731 F.2d at 943; see also Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1137 (D.D.C. 1983) ("The Protection of Trading Interests Act of 1980 directs British courts not to enforce treble damage awards against British firms,

(continued...)

Rather, it arose out of the legislative policies of the United States and Japan, which resulted in "a head-on collision between the diametrically opposed anti-trust policies of the United States and [Japan]." Laker Airways, 731 F.2d at 916, 948. Unlike Laker Airways, however, the present case involves no pending litigation between the parties (other than the present appeal) in the United States courts. Consequently, regardless of our approval or disapproval of clawback litigation in a particular foreign court, given the present posture of this case, it is beyond our limited jurisdiction and contrary to principles of comity to prevent TKS from seeking an action under the Special Measures Law in Japan. See Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172 (8th Cir. 1994) (noting federal courts "can only hear actual 'cases or controversies' as defined by Article III of the Constitution," and "[w]hen a case on appeal no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it" (citing Preiser v. Newkirk, 422 U.S. 395, 401 (1975))).

Although the Special Measures Law, like other clawback or blocking provisions, can be regarded as an affront to the laws and judicial rules of the United States, see, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct., 482 U.S. 522, 542-44 &

(...continued)
and . . . [its] 'clawback' provision allows non-United States firms doing business in the United Kingdom to sue there to recover two-thirds of treble damage awards levied against them in the United States.").

n.29 (1987) (discussing France's blocking statute aimed at frustrating the disfavored United States antitrust discovery rules, and concluding the Hague Convention did not deprive the district court of jurisdiction it otherwise possessed to order a foreign national to produce evidence physically located within a foreign signatory nation), the United States Executive and Legislative Branches, not the Judiciary, are the governmental bodies to address those diplomatic tensions, see, e.g., Dames & Moore v. Regan, 453 U.S. 654, 686-87 (1981) (concluding, under the specific facts of the case, the district court properly denied injunctive relief because the President acted within his executive powers in nullifying claims pending in the United States court against Iranian assets); Karaha Bodas Co., 335 F.3d at 373 (concluding the district court acted in contravention of a treaty–the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38, codified at 9 U.S.C. § 201–by enjoining a party from seeking an action to annul an arbitration award).

The propriety of the Special Measures Law, and TKS's action thereunder, are matters for the Japanese courts in the first instance. Any response by the United States, such as a blocking statute for protection against a judgment awarded under the Special Measures Law or trade sanctions against Japan, must come through authorized representatives of the United States Executive or Legislative Branches, not the Judiciary. As the Laker Airways court observed,

> The resources of the Judiciary are inherently limited when faced with an affirmative decision by the political branches of the govern-

> ment to prescribe specific policies. Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association. These forums should and, we hope, will be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction.

Laker Airways, 731 F.2d at 955.

The district court's obvious purpose in issuing the antisuit injunction was to constrain TKS from undermining six years of litigation by seeking recovery under the newly promulgated Japanese Special Measures Law. At the time the district court issued the injunction, TKS had not paid its judgment and the district court had not lifted the stay on TKS's performance bond. Given the status of the case at the time the injunction issued, the district court maintained ancillary enforcement jurisdiction to preserve the judgment and pursue collection. Thus, we need not decide whether the district court abused its discretion in issuing the preliminary antisuit injunction at that juncture. However, the jurisdictional circumstances and comity considerations have changed because there is no longer an outstanding judgment to protect. Given the criteria for granting a foreign antisuit injunction

set forth and discussed herein, we conclude, under the facts of this case, the maintenance of the antisuit injunction on a satisfied judgment cannot be justified.[9]

III. CONCLUSION

We vacate the district court's grant of a preliminary antisuit injunction and remand for dismissal of Goss's motion for injunctive relief.

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[9] We recognize there are cases where the satisfaction of judgment is not, as here, solely the payment of a money judgment. Therefore, we reach no categorical conclusion regarding the propriety of the issuance of an antisuit injunction in all cases involving the preservation of a judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-2658

Goss International Corporation, a Delaware corporation, formerly known as Goss Graphic Systems, Inc.,

Appellee

v.

Man Roland Druckmaschinen Aktiengesellschaft, a German corporation, et al.,

Tokyo Kikai Seisakusho, LTD., a Japanese corporation and TKS (U.S.A.), INC., a Delaware corporation,

Appellants

Mitsubishi Heavy Industries, LTD., a Japanese corporation and MLP U.S.A., INC., a Delaware corporation,

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THE GOVERNMENT OF JAPAN,

Amicus on Behalf of Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids

(1:00-cv-00035-LRR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy and Judge Colloton did not participate in the consideration or decision of this matter.

July 24, 2007

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-2658

Appeal from the United States District Court for the Northern District of Iowa

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Goss International Corporation, formerly known as Goss Graphic Systems, Inc., a Delaware corporation,

Plaintiff/Appellee,

v.

Man Roland Druckmaschinen Aktiengesellschaft, a German corporation; Man Roland, Inc., a Delaware corporation; Koenig & Bauer Aktiengesellschaft, a German corporation; KBA North America, Inc., a Delaware corporation,

Defendants,

Tokyo Kikai Seisakusho, Ltd., a Japanese corporation; TKS (U.S.A.), Inc., a Delaware corporation,

Defendants/Appellants,

Mitsubishi Heavy Industries, Ltd., a Japanese corporation; MLP U.S.A., Inc., a Delaware corporation,

Defendants,

The Government of Japan,

Amicus on Behalf of Appellants.

Submitted: September 28, 2006
Filed: June 18, 2007

Before RILEY, SMITH, and BENTON, Circuit Judges.

RILEY, Circuit Judge.

On December 3, 2003, a jury found Japanese-based Tokyo Kikai Seisakusho,Ltd. (TKS), liable to Goss International Corporation (Goss), under the Antidumping Act of 19 16 (the 1916 Act), 15 U.S.C. § 72 (repealed 2004), which made it unlawful for foreign persons to sell imported articles within the United States at a price substantially less than the actual market value or wholesale price at the time of exportation, with the intent of destroying or injuring an industry in the United States.The judgment, inclusive of statutory treble damages, attorney fees, and costs, amounted to more than $35,000,000.

During the pendency of TKS's appeal, Congress prospectively repealed the 1916 Act. See Miscella-

neous Trade & TechnicaI Corrections Act of 2004, Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597 (2004). Shortly thereafter, the Japanese government passed "The Special Measures Law concerning the Obligation to Return Profits Obtained pursuant to the Antidumping Act of 1916 of the United States, etc., Law No. 162,2004[1]" (Special Measures Law), a claw-back statute[2] allowing Japanese nationals to sue for the recovery of any judgment entered against them under the 1916 Act.

On June 15, 2006, the district court granted Goss's motion for preliminary injunction, prohibiting TKS from filing suit in Japan under the Special Measures Law. On June 19, 2006, TKS paid the judgment in

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[1]Amerika gasshuukoku no 1916 nen no han futou renbai hou ni motoduki uketa rieki no henkan gimu tou ni kansuru tokubetsu sochi hou [Special Measures Law], Law No. 162 of 2004.

[2] A clawback statute is a countermeasure that enables defendants who have paid a multiple damage judgment in a foreign country to recover the multiple portion of that judgment from the plaintiff. See generally, Joseph E. Neuhaus, Note, Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law, 81 Colum. L. Rev. 1097, 1097-98 (1981) (citing the Protection of Trading Interests Act, 1980, c.11, § 5 (U.K.)); Joseph P. Griffin, United States Antitrust Laws and Transnational Business Transactions: An Introduction, 21 Int'l Law. 307,327 (1987) (discussing clawback legislation enacted by the United Kingdom, Australia, and Canada that allows companies which have paid treble damages under United States antitrust law judgments to "sue the successful plaintiff in the local courts for a return of all or a portion of the damages").

full, and the district court entered a satisfaction of judgment on June 21, 2006. On June 23, 2006, TKS filed this interlocutory appeal. In light of the changed circumstances since the district court entered its preliminary injunction, we vacate the district court's preliminary injunction.

I. BACKGROUND

Goss and TKS both manufacture and supply newspaper printing presses and press additions. Goss was the major manufacturer of large printing presses in the United States for more than a century and enjoyed dominance in the United States printing press market into the late 1990s. Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft (Goss I), 434 F.3d 108 I , 1084-85 (8th Cir.), cert. denied, 126 S. Ct. 2363 (2006).

In the 1970s, TKS began selling its presses and press additions in the United States. By the I980s, TKS obtained contracts with large United States newspapers, including *The Wall Street Journal, The Washington Post,* and the *Newark Star-Ledger.* Between 1991 and 2000, TKS began "dumping" its products, that is, selling them in the United States at prices substantially below the market value of its similar products in Japan. During that period, TKS sold $125,000,000 worth ofprinting press additions in the United States. Goss, on the other hand, lost contracts because customers expected Goss to lower its prices to match TKS's prices. In 2000, Goss did not make a single printing press equipment sale. See id. at 1085.

In March 2000, Goss brought a civil action against TKS alleging violations of the 1916 Act. See id. at 1087. On December 3, 2003, a jury found in Goss's favor and awarded $10,539,949 in damages. See id. at 1087-88. The district court statutorily trebled the damages, pursuant to the 1916 Act, and entered judgment against TKS in the amount of $31,619,847, plus interest and costs. See id. at 1088, The district court also awarded $3,484,158 in attorney fees and expenses, and $68 1,475.05 in costs. TKS appealed.

On December 3, 2004, Congress repealed the 1916 Act. Because the repeal was prospective, it did not affect Goss' s judgment. Japan considered the prospective repeal to be inconsistent with the United States's obligations under World TradeOrganization (WTO) agreements.[3] Consequently

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[3] The United States, Japan, and the European Communities (EC) are members of the WTO, which is an international trade organization established in 1995 to administer trade agreements, provide a forum for trade negotiations, and handle trade disputes between member nations. In November 1998, the EC asked the WTO's Dispute Settlement Body (DSB) to establish a dispute settlement panel because of pending litigation in the United States against EC entities under the 1916 Act. The EC argued the 1916 Act was inconsistent with WTO covered agreements, and therefore the United States breached its WTO obligations by failing to repeal the 1916 Act. Japan registered the same complaint in June 1999. The United States defended its position, insisting the trade effects of the 1916 Act were de minimis, and pointing out that in the eighty-two years since its passage, no money damages or other relief ever had been awarded under the 1916 Act. The DSB agreed to establish dispute panels to review the EC's and Japan's complaints.

In 2000, the dispute panels concluded (1) the 1916 Act violated WTO covered agreements, including the General Agreement on

(continued...)

on December 8, 2004, Japan enacted the Special Measures Law, a clawback statute authorizing Japanese corporations and/or Japanese nationals to sue in Japanese courts for recovery of the full amount of any judgment, plus interest, attorney fees and costs, awarded under the 1916 Act. Special Measures Law, art. 3, 6. The Special Measures Law holds any wholly-

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[3] (...continued)
Tariffs and Trade 1994 (GATT), the Anti-dumping Agreement (the Agreement on Implementation of Art. VI of the GATT), and the WTO Agreement; and (2) benefits accruing to the EC and Japan under the WTO Agreement had been nullified or impaired. The panels' decisions recommended the United States "bring the 1916 Act into conformity with its obligations under the WTO Agreement." The DSB adopted the panels' decisions and authorized arbitration to determine a reasonable time period for the United States to implement the provisions of the panels' decisions.

The United States requested extensions to the implementation period, explaining more time was necessary for Congress to enact legislation repealing the 1916 Act. Japan and the EC agreed to the extensions on the condition "the proposal and the draft Bill specifically addressed the repeal of the Act and the effect of the repeal were applicable to all actions pending on the date of enactment of the repeal Act, and to all actions filed after the date of enactment." However, in June 2002, the EC and Japan reactivated arbitration when a bill was introduced in Congress providing for the *prospective* repeal of the 1916 Act.

In February 2004, the WTO arbitrators approved the suspension of concessions to the United States. The suspension allowed for, among other things, a level of nullification equal to the total amount of any final judgments and/or settlement claims awarded under the 1916 Act. See generally World Trade Organization Appellate Body Reports, 2000, United States–Anti-Dumping Act of of 1916, http://www.wto.org/english/tratop_e/ab_reports_e.htm (last visited June 12, 2007).

owned parent companies and subsidiaries of the party that prevailed under the 1916 Act jointly and severally liable for the clawback judgment. Id. Goss Graphic Systems Japan (Goss Japan), which is located in Tokyo, is a wholly-owned subsidiary of Goss.

On November 24, 2004, by stipulation of the parties, TKS agreed not to file a lawsuit under the Special Measures Law until after TKS exhausted its appeal in the antidumping action. The stipulation also required TKS to provide Goss fourteen days' notice of its intention to pursue a remedy under the Special Measures Law. On January 26, 2006, our court affirmed the jury verdict and damages award in the antidumping action, see Goss I, 434 F.3d at 1084, and on June 5, 2006, the United States Supreme Court denied TKS's petition for writ of certiorari, see Tokyo Kikai Seisakusho. Ltd. v. Goss Int'l Corp., 126 S. Ct. 2363 (2006).

The same day the Supreme Court denied TKS's petition, TKS notified Goss of its intent to file suit under the Special Measures Law. Goss filed a motion for preliminary and permanent antisuit injunction to prevent TKS "from usurping the Court's jurisdiction and frustrating the Court's judgment." On June 15, 2006, the district court issued a preliminary antisuit injunction enjoining TKS from filing suit under the Special Measures Law. Goss Int'l Corp. v. Tokyo Kikai Seisakusho. Ltd. (Goss P.I.), 435 F. Supp. 2d 919,931 (N.D. Iowa 2006). On June 19,2006, TKS paid the judgment in hll, and the district court entered a satisfaction of judgment on June 21, 2006. On August 9, 2006, pursuant to TKS's motion, the district court terminated TKS's bond stating, "[t]he supersedeas

bond, which was posted to protect the original judgment of the court, cannot be held in a speculative fashion to protect a possible award for attorney fees and costs spent on a possible decision granting a permanent anti-suit injunction that may possibly be appealed."

On December 3, 2004, Congress repealed the I916 Act, specifying the repeal "shaI1 not affect any action under [the 19 16 Act] that was commenced before the date of the enactment of this Act and is pending on such date." Pub. L. No. 108-429, 2006(a)-(b), I18 Stat. 2434, 2597.

II. DISCUSSION

A. Proper Standard for Issuance of a Foreign Antisuit Injunction

The propriety of issuing a foreign antisuit injunction is a matter of first impression for our circuit. Other circuits having decided the issue agree that "federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits." Kaepa, Inc. v. Achilles Corn., 76 F.3d 624, 626 (5th Cir. 1996); *see* Laker Airways Ltd. v. Sabena. Belgian World Airlines, 73 1 F.2d 909,926 (D.C. Cir.1984) (citing Cole v. Cunningham, 133 U.S. 107, 116-17 (1890)). The circuits are split, however, on the level of deference afforded to international comity indetermining whether a foreign antisuit injunction should issue.

The First, Second, Third, Sixth, and District of Columbia Circuits have adopted the "conservative approach," under which a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity. See Quaak v. Klynveld Peat Manvick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004) (adopting the "conservative approach," which questions "whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy" and "accords appreciably greater weight to considerations of international comity"); see also Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 161 (3d Cir. 2001) (same); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (same); China Trade & Dev. Corp. v. M.V. Choong: Yong, 837 F.2d 33,35-37 (2d Cir. 1987) (same); Laker Airways, 73 1 F.2d at 926-34 (same). Under the conservative approach, "[c]omity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest of cases." Gau Shan Co., 956 F.2d at 1354 (citing Laker Airways, 73 1 F.2d at 927); see also China Trade, 837 F.2d at 35-36 (holding an antisuit injunction "effectively restricts the jurisdiction of the court of a foreign sovereign," thus, such orders "should be used sparingly, and should be granted only with care and great restraint" (internal quotation marks and citations omitted)).

In contrast, the Fifth and Ninth Circuits follow the "liberal approach," which places only modest emphasis on international comity and approves the issuance of

an antisuit injunction when necessary to prevent duplicative and vexatious foreign litigation and to avoid inconsistent judgments. See Kaepa, Inc., 76 F.3d at 627-28 (concluding a district court does not abuse its discretion by issuing an antisuit injunction when litigation of the same action in a foreign forum "would result in inequitable hardship and tend to frustrate and delay the speedy and efficient determination of the cause" (internal quotations omitted)); see also E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989-91 (9th Cir. 2006) (applying the Fifth Circuit's standard for issuance of an antisuit injunction (citing Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3 d 357,364 n. 1 9, 366-67 (5th Cir. 2003))), The Seventh Circuit similarly has indicated its agreement with the liberal approach. See Allendale Mut. Ins. Co. v. Bull Data SYS., Inc., 10 F.3d 425,430-3 1 (7th Cir. 1993).

Under either the conservative or liberal approach, "[wlhen a preliminary injunction takes the form of a foreign antisuit injunction, [courts] are required to balance domestic judicial interests against concerns of international comity." Karaha Bodas Co., 335 F.3d at 366. We agree with the observations of the First Circuit that the conservative approach (1) "recognizes the rebuttable presumption against issuing international antisuit injunctions," (2) "is more respectful of principles of international comity," (3) "compels an inquiring court to balance competing policy considerations,"and (4) acknowledges that "'issuing an international antisuit injunction is a step that should 'be taken only with care and great restraint' and with the

recognition that international comity is a fundamental principle deserving of substantial deference." Quaak, 361 F.3d at 18 (quoting Canadian Filters (Hanvich) Ltd. v. Lear-Siegler. Inc., 412 F.2d 577, 578 (1st Cir. 1969)). Likewise, we agree with the Sixth Circuit's observation the liberal approach "conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." Gau Shan Co., 956 F.2d at 1355.

Although comity eludes a precise definition, its importance in our globalized economy cannot be overstated. Compare Hilton v. Guyot, 159 U.S. 1 13, 164 (1 895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"), with Turner Entm't Co. v. Derreto Film GmbH, *25* F.3d 15 12, 1519 n.10 (11th Cir. 1994) (noting commentators have defined comity using terms such as, "courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or consideration of high international politics concerned with maintaining amicable and workable relationships between nations" (internal quotation marks omitted)). Indeed, the "world economic interdependence has highlighted the importance of comity, as international commerce depends to a large extent on 'the ability of merchants to predict the likely consequences of their conduct in overseas markets.'" See Quaak, 361 F.3d at 19 (quoting Gau Shan Co., 956 F.2d at 1355)). We also note, the Congress and the President possess greater experience with, knowledge

of, and expertise in international trade and economics than does the Judiciary. The two other branches, not the Judiciary, bear the constitutional duties related to foreign affairs. For these reasons, we join the majority of our sister circuits and adopt the conservative approach in determining whether a foreign antisuit injunction should issue.

B. Application of the Standard

1. District Court's Decision

In the absence of guidance from our circuit or the Supreme Court regarding the standard for issuing an antisuit injunction, the district court noted the split of authority and concluded under either the conservative or the liberal approach, "it is settled that considerations of comity have diminished force when, as here, one court has already reached judgment." Goss P.I., 435 F. Supp. 2d at 928 (citing Paramedics Electromedicina Comercial, Ltda. v. G.E. Med. Sys. Info. Techs., Inc., 369 F.3d 645, 655 (2d Cir. 2004)). In reaching this conclusion, the district court relied on the seminal case of Laker Airways Ltd. v. Sabena, Belgian World Airlines, wherein the Court of Appeals for the District of Columbia Circuit made an exhaustive inquiry into the propriety of issuing a foreign antisuit injunction. See Laker Airways, 731 F.2d at 909-59.[4]

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[4] While applying our circuit's traditional four-factor preliminary injunction analysis under Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 1 14 (8th Cir. 1981) (en banc), the district court recognized the awkward fit of such an analysis

(continued...)

As an initial matter, the district court noted the parties agreed the district court had equitable power to issue a foreign antisuit injunction to enjoin a party before it from pursuing litigation in a foreign forum, and "the All Writs Act, 18 U.S.C. § 1651, empowers the court to issue an injunction barring TKS from filing suit under the Japanese Special Measures Law." Goss P.I., 435 F. Supp. 2d at 924-25.

The district court next determined TKS's proposed invocation of the Special Measures Law was "a direct attack on [the] court's judgment in favor of Goss and a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole," an assault instituted "'for the sole purpose of terminating' [the] court's judgment in Goss's favor." Id. at 929 (quoting Gau Shan Co., 956 F.2d at 1356 (quoting Laker Airways, 731 F.2d at 9 15)). The district court reasoned TKS's proposed litigation was "clearly vexatious and oppressive" because TKS effectively sought to terminate the district court's judgment in favor of Goss, and "thereby in a single filing attempting to undo six years of federal court litigation." Id. The district court acknowledged that the issuance of an antisuit injunction "would be deeply offensive to the Japanese govern-

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(...continued)
in cases involving foreign antisuit injunctions. See Goss P.I., 435 F. Supp. 2d at 926 n.7. We agree. The analysis for issuing a foreign antisuit injunction primarily should focus on (1) whether an action in the foreign jurisdiction prevents United States jurisdiction or threatens a vital United States policy, and (2) whether the domestic interests outweigh concerns of international comity. We focus our review, therefore, upon the district court's analysis of these particular factors.

ment" and "may have international repercussions," but nonetheless determined "its interest in protecting the integrity of its judgments and jurisdiction outweighs concerns over international comity ." Id. The district court concluded:

> The fact that the legislative and executive branches were aware of this court's judgment and deliberately chose *not* to undo it through a retroactive repeal of the 1916 Act must inform the weight this court must give to international comity in this case. It is not the province of this court or the federal judiciary in general to rewrite the foreign policy of the United States government, as expressed by the legislative and executive branches of government.

Id. at 930.

Thus, the district court found the factors weighed in Goss's favor and issued a preliminary injunction. Id. at 931. In doing so, the district court stressed the order enjoined only TKS, not the Japanese government or judiciary, from availing itself of the Special Measures Law until the district court determined the merits of Goss's permanent injunction motion.

On appeal, TKS argues, because the judgment has been paid, a Japanese suit under the Special Measures Law would not threaten the jurisdiction of the United States. TKS further argues the United States would be deeply offended if a foreign court granted an antisuit injunction under similar circumstances. TKS concedes a United States court may properly enjoin a party from seeking an order in a foreign court that would deprive the United States court of jurisdiction

over a claim properly before it, but a United States court may not prevent a foreign national from taking recourse to its own courts for relief under a foreign statute that does not interfere with the jurisdiction of the United States courts. TKS further contends, under the district court's rationale, all actions under foreign clawback statutes are subject to injunction because all foreign clawback statutes would deprive United States courts of jurisdiction. Finally. TKS claims no vital American policy is being protected by the antisuit injunction.

2. Standard of Review

Our standard of review over the issuance of a preliminary injunction is a familiar one. "We review the District Court's material factual findings for clear error,its legal conclusions de novo, and the court's equitable judgment-the ultimate decision to grant the injunction-for an abuse of discretion." Heartland Acad. Cmty. Church v. Waddle, 335 F.3d 684, 689-90 (8th Cir. 2003).

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 2472 (8th Cir. 1994) (quotation omitted) .

3. Goss's Antisuit Injunction

At the outset of our review, we acknowledge the district court's unenviable task to navigate the uncharted waters of foreign antisuit injunctions. We begin our review with a discussion of the instructive Laker Airways case relied upon by the district court, Laker Airways (Laker) brought an antitrust action against four foreign airlines and four domestic corporations in the United States District Court for the District of Columbia. Laker Airways, 731 F.2d at 917. Shortly after Laker filed the lawsuit, the foreign defendants filed an action in the United Kingdom's High Court of Justice, requesting a declaration of nonliability and an injunction to prevent Laker from pursuing remedies in the United States courts under United States antitrust laws. Id. at 918. The requested relief stemmed from the alleged incompatibility between United States antitrust laws with their consequent treble damages on the one hand, and the Bermuda II Treaty and the British Protection of Trading Interests Act on the other. Id. The United Kingdom's High Court of Justice granted the injunction, which effectively terminated Laker' s pending United States litigation as to the four foreign defendants. Id. In the district court, Laker successfully enjoined the remaining domestic defendants and two foreign airline defendants in a second antitrust action from filing any action in a foreign court that "would

interfere with the district court's jurisdiction over the matters alleged in the complaint." Id. at 918- 19.

On appeal, the Laker Airways defendants argued "the injunction was unnecessary to protect the district court's jurisdiction and violate[d] their right to take part in the 'parallel' actions commenced in the English courts." Id. at 921. A divided panel affirmed the decision, concluding an injunction by the United Kingdom's High Court of Justice would have stripped the United States court of control over Laker's pending litigation. Id. at 955-56. The court did not reach this conclusion without much deliberation, first recognizing "the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." Id. at 926-27. The court cautioned that while foreign antisuit injunctions only operate on the parties within the court's jurisdiction, "they effectively restrict the foreign court's ability to exercise its jurisdiction." Id. at 927.

In deciding the propriety of issuing an antisuit injunction, the Laker Airways court established factors to be considered, which included protecting United States jurisdiction, preserving important United States public policies, and balancing domestic interests with the principles of international comity. Id. at 926-45. The court recognized the futility of an interest balancing test in determining prescriptive jurisdiction because the "courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calcu-

lated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law." Id. at 948. While acknowledging the domestic courts' obligation "to apply international law and foster comity," the court conceded that, when in doubt, "national interests will tend to be favored over foreign interests." Id. at 951, The court concluded, to protect properly the jurisdiction of the United States over the prescriptive jurisdiction of its United States antitrust laws, the district court acted within its discretion by enjoining the defendants from pursuing an injunction in the United Kingdom's High Court of Justice. Id. at 955-56. The court recognized, however, along with this act of preserving its own jurisdiction ran "the risk that counterinjunctions or other sanctions will eventually preclude Laker from achieving any remedy, if it is ultimately entitled to one under United States law. In either case the policies of both countries are likely to be frustrated at the cost of substantial prejudice to the litigants' rights." Id. at 953.

As in Laker Airways, most cases dealing with foreign antisuit injunctions involve simultaneous litigation in both United States and foreign courts. In Gau Shan Co. v. Bankers Trust Co., for example, a borrower brought an action in a United States district court against its lender for fraud in connection with a loan note. Gau Shan Co., 956 F.2d at 1352. When the lender tried to file an action in Hong Kong against the borrower for failure to pay the loan note, the United States court granted the borrower's motion for a foreign antisuit injunction. Id. The Sixth Circuit reversed, holding a parallel suit did not threaten

United States jurisdiction and international comity precluded the issuance of an antisuit injunction. Id. at 1355-59. The court reasoned, "The possibility that a holding of a Hong Kong court might permit [the lender] to gain control of [the borrower] is not a threat to the jurisdiction ofthe United States courts; rather, it is merely a threat to [the borrower]'s interest in prosecuting its lawsuit." Id. at 1356. Similarly, in China Trade & Dev. Corp. v. M.V. Choong Yong, the Second Circuit reversed the issuance of an antisuit injunction, concluding parallel litigation in the United States and Korea concerning a Korean corporation's liability did not frustrate an important United States policy or threaten the jurisdiction of the United States courts. China Trade, 837 F.2d at 34.

Other courts have upheld the issuance of a foreign antisuit injunction in the face of parallel litigation. For example, in Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, when investors filed a securities fraud class action lawsuit in a United States district court against Klynveld Peat Marwick Goerdeler Bedrij fsrevisoren (KPMG-B), KPMG-B was also a defendant in a contemporaneous criminal action in Belgium. Quaak, 361 F.3d at 14. The class action plaintiffs sought documents from KPMG-B, but KPMG-B claimed Belgian law prohibited KPMG-B from releasing the information. Id. at 14- 15. Thereafter, KPMG-B instituted an action in the Belgian judicial system seeking to enjoin the class action plaintiffs from "taking any step" toward the discovery requests and to impose substantial penalties on parties pursuing discovery procedures. Id. The class action plaintiffs countered this move by filing a

motion in the United States action and obtaining a foreign antisuit injunction against KPMG-B to prevent KPMG-B from pursuing the Belgian injunctive action. Id. On appeal, the First Circuit affirmed the injunction, agreeing with the district court that the character of the foreign action, the public policy of protecting investors against fraud, and the need to protect the court's jurisdiction all counterbalanced comity concerns under the peculiar circumstances of the case. Id. at 20.[5]

The case before us does not fit within the category of cases in which foreign antisuit injunctions have been considered. We do not believe the rationale of those cases compels an injunction in the present case.

First, although the All Writs Act, 28 U.S.C. § 1651 (a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the Act does not create an independent source of federal jurisdiction. Synenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 31 (2002) (quoting 28 U.S.C. § 1651(a) and declaring the All Writs Act does not establish the original jurisdiction to support removal jurisdiction); see Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328,333-34 (2d Cir. 2006) (rejecting the district court's assertion that an injunction issued pursuant to the All Writs Act provided the court with subject matter jurisdiction concluding, "[t]o

[5] Foreign antisuit injunctions also have been dealt with in the context of compelling arbitration, see Paramedics Electromedicina, 369 F.3d at 648-49, and enforcing arbitration agreements, see Karaha Bodas Co., 335 F.3d at 359-60.

hold otherwise would make mincemeat of the limited grants of jurisdiction bestowed upon us"); Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 413 (2d Cir. 2002) (noting the All Writs Act, while not conferring an independent basis of jurisdiction, "'provides a tool courts need in cases over which jurisdiction is conferred by some other source'" (quoting United States v. Tablie, 166 F.3d 505, 507 (2d Cir. 1999) (per curiam))); Phillips Beverage Co. v. Belvedere S.A., 204 F.3d 805, 806 (8th Cir. 2000) (concluding the district court had continuing jurisdiction, therefore the All Writs Act provided the district court the authority to prevent a party from making an end run around the district court's previous denial of interim relief by enjoining the party from seeking relief elsewhere); Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932, 937 (9th Cir. 1993) (concluding the All Writs Act does not operate to confer jurisdiction upon the district court, rather the Act only aids jurisdiction the district court already possesses).[6] In this case, at the time the district court issued the preliminary antisuit injunction, the district court

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[6] Although not a base of jurisdiction, the All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3991(3d ed. 1998). See, e.g., Sprint Spectrum, 283 F.3d at 413-14 (concluding the district court had the authority under the All Writs Act to compel a third party, without whom there would have been no underlying case or controversy, to perform the third party's contractual obligations to prevent the frustration of the district court's orders previously issued in the underlying action).

clearly possessed jurisdiction over the case and parties pursuant to 28 U,S.C. § 1331, and TKS had not paid the monetary judgment. Thus, the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment. See Peacock v. Thomas, 516 U.S. 349, 356-57 (1996) ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." (quoting Riggs v. Johnson County, 73 U.S. 166, 187 (1867) ("[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.")))).

Now, however, the antidumping litigation has culminated: a verdict was entered for Goss, which we affirmed on appeal; TKS paid the judgment; and the district court lifted the stay of the supersedeas bond. Therefore, the judgment now is rendered, paid, and satisfied. No pending litigation, other than this appeal, remains in the United States courts. Thus, the request for injunctive relief is not for the prevention of interdictory jurisdiction by Japanese courts. Instead, the United States courts are being asked to prevent TKS from seeking a remedy available solely in Japan. Neither the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction to enjoin TKS under these circumstances. See Peacock, 516 U.S. at 358 ("In determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction over proceedings that are 'entirely new and original,' or where 'the relief [sought

is]of a different kind or on a different principle' than that of the prior decree." (quoting Krippendorf v. Hyde, 110 U.S. 276, 285 (1884), and Dugas v. Am. Surety Co., 300 U.S. 414,428 (1937), respectively)).

Second, in cases involving parallel litigation in foreign countries, once one court reaches a final judgment, the role of comity for antisuit injunction purposes essentially is moot because there is no longer tension with the foreign country over *concurrent* jurisdiction. Instead, the doctrine of res judicata should apply as a defense to further litigation of the same issues. As the Laker Airways court explained, "Comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense." Laker Airways, 731 F.2d at 939.

The issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction. TKS now seeks to litigate in Japan a cause of action solely available in Japan and not previously litigated in the antidumping litigation. The issues are not the same simply because TKS's cause of action under the Special Measures Law rests on the imposition of an adverse judgment against TKS under the 1916 Act.

Third, we disagree with the district court's assertion that Congress's decision to repeal the 1916 Act prospectively, rather than retroactively, may play a role in the decision to grant a foreign antisuit injunction to protect the court's jurisdiction or an important United

States policy. Nothing in the repeal of the 1916 Act, nor any principle of law (aside from the doctrines of res judicata and collateral estoppel, which are inapplicable here), confers jurisdiction upon the court to maintain authority over the parties now that judgment has been satisfied. Cf. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1013 (8th Cir. 2002) (applying the relitigation exception of the All Writs Act, which protects from future litigation, a claim or issue that relates back to a prior federal court decision). Indeed, in repealing the 1916 Act, the Committee on the Judiciary (Committee) was clearly acting in response to the WTO proceedings and the potential for retaliation against the United States for not repealing the 1916 Act. See H.R. Rep. No. 108-415, at 5 (2004). The Committee knew the European Union (EU) approved a regulation banning "the recognition and application of decisions taken under the 1916 Act within EU countries," and "allow[ing] EU-based companies and citizens to claim damages (with interest) for any penalties associated with [the 1916 Act's] application." Id. The dissenting members of the Committee also knew the EU's "blocking" regulation provided "EC companies with a right to recover any costs incurred in 19 16 Act litigation." Id. at 18.

The district court also placed too much emphasis on the impact of the Special Measures Law on United States public policy. The Special Measures Law has a onetime application: There is no pending litigation under the now-defunct 1916 Act; Goss received the only judgment ever granted under the Act; thus, the only lawsuit possible under the Special Measures Law can be brought against Goss alone. Our consideration

of international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures Law, which will undoubtedly involve application of Japanese precedent and domestic policy, and the Japanese courts' own consideration of international comity. If the Japanese judiciary upholds the enforceability of the Special Measures Law, it must next determine whether jurisdiction over Goss exists to maintain the lawsuit. International comity requires us to give deference to the Japanese courts to interpret Japanese laws. Goss is not precluded from seeking afirmative defenses under Japanese law in defending itself from the countermeasure. Furthermore, the United States representative to the WTO may seek to enforce provisions of the WTO Agreement to prevent TKS from enforcing the Special Measures Law as a suspension of obligation.[7]

We are profoundly aware a judgment in favor of TKS under the Special Measures Law would effectively nullify the remedy Goss legitimately procured in the United States courts. Although such a result understandably is objectionable to Goss, it does not threaten United States jurisdiction or any current United States policy. Cf. Gau Shan Co., 956 F.2d at 1356 (concluding the possibility a foreign court's holding might threaten the United States plaintiffs interest in prosecuting its lawsuit is not a threat to the jurisdic-

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[7] We have not been apprised whether the DSB found Japan's Special Measures Law consistent with the WTO's suspension of concessions to the United States or whether the Special Measures Law otherwise has been challenged before the WTO. See supra n.3.

tion of the United St[illegible] courts); Sea Containers Ltd. v. Stena AB, 890 F.2d [illegible]205, 1213-14 (D.C. Cir. 1989) (holding no basis for an antisuit injunction existed because the issues litigated in the foreign court were different despite the fact hat successful litigation in the foreign court would effectively overturn a decision of the United States court).

As in Laker Airways, the matter before us did not begin as an international jurisdictional standoff.[8] Rather, it arose out of the legislative policies of the United States and Japan, which resulted in "a head-on collision between the diametrically opposed anti-trust policies of the United States and [Japan]." Laker Airways, 731 F.2d at 916, 948. Unlike Laker Airways, however, the present case involves no pending litigation between the parties (other than the present appeal) in the United States courts. Consequently, regardless of our approval or disapproval of clawback litigation in a particular foreign court, given the present posture of this case, it is beyond our

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[8] The Laker Airways court discussed the tension between the antitrust laws of the United States and the United Kingdom, and the potential ramifications under the Protection of Trading Interests Act, 1980, c. 11, § 5 (U.K.), a British clawback statute, which provides protection from multiple damage awards imposed under the laws of countries outside the United Kingdom. See Laker Airways, 73 1 F.2d at 943; see also Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1137 (D.D.C. 1983) ("The Protection of Trading Interests Act of 1980 directs British courts not toenforce treble damage awards against British firms, and . . . [its] 'clawback' provision allows non-United States firms doing business in the United Kingdom to sue there to recover two-thirds of treble damage awards levied against them in the United States.").

limited jurisdiction and contrary to principles of comity to prevent TKS from seeking an action under the Special Measures Law in Japan. See Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172 (8th Cir. 1994) (noting federal courts "can only hear actual 'cases or controversies' as defined by Article III of the Constitution," and "[w]hen a case on appeal no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it" (citing Preiser v. Newkirk, 422 U.S. 395, 401 (1975))).

Although the Special Measures Law, like other clawback or blocking provisions, can be regarded as an affront to the laws and judicial rules of the United States, see, e.g, Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct., 482 U.S. 522, 542-44 & n.29 (1987) (discussing France's blocking statute aimed at frustrating the disfavored United States antitrust discovery rules, and concluding the Hague Convention did not deprive the district court of jurisdiction it otherwise possessed to order a foreign national to produce evidence physically located within a foreign signatory nation), the United States Executive and Legislative Branches, not the Judiciary, are the governmental bodies to address those diplomatic tensions, see, e.g. Dames & Moore v. Regan, 453 U.S. 654, 686-87 (1981) (concluding, under the specific facts of the case, the district court properly denied injunctive relief because the President acted within his executive powers in nullifying claims pending in the United States court against Iranian assets); Karaha Bodas Co., 335 F.3d at 373 (concluding the district court acted in contravention of a treaty-the United

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38, codified at 9 U.S.C. § 201-by enjoining a party from seeking an action to annul an arbitration award).

The propriety of the Special Measures Law, and TKS's action thereunder, are matters for the Japanese courts in the first instance. Any response by the United States, such as a blocking statute for protection against a judgment awarded under the Special Measures Law or trade sanctions against Japan, must come through authorized representatives of the United States Executive or Legislative Branches, not the Judiciary. As the Laker Airways court observed,

> The resources of the Judiciary are inherently limited when faced with an affirmative decision by the political branches of the government to prescribe specific policies. Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association. These forums should and, we hope, will be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction.

Laker Airways, 73 1 F.2d at 955.

The district court's obvious purpose in issuing the antisuit injunction was to constrain TKS from undermining six years of litigation by seeking recovery under the newly promulgated Japanese Special Measures Law. At the time the district court issued the injunction, TKS had not paid its judgment and the district court had not lifted the stay on TKS's performance bond. Given the status of the case at the time the injunction issued, the district court maintained ancillary enforcement jurisdiction to preserve the judgment and pursue collection. Thus, we need not decide whether the district court abused its discretion in issuing the preliminary antisuit injunction at that juncture. However, the jurisdictional circumstances and comity considerations have changed because there is no longer an outstanding judgment to protect. Given the criteria for granting a foreign antisuit injunction set forth and discussed herein, we conclude, under the facts of this case, the maintenance of the antisuit injunction on a satisfied judgment cannot be justified.[9]

III. CONCLUSION

We vacate the district court's grant of a preliminary antisuit injunction and remand for dismissal of Goss's motion for injunctive relief.

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[9] We recognize there are cases where the satisfaction of judgment is not, as here, solely the payment of a money judgment. Therefore, we reach no categorical conclusion regarding the propriety of the issuance of an antisuit injunction in all cases involving the preservation of a judgment.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

GOSS INTERNATIONAL CORPORATION, a Delaware corporation,

Plaintiff, No. C00-35 LRR

vs. TOKYO KIKAI SEISAKUSHO, LTD., a Japanese corporation and TKS (U.S.A.), Inc., a Delaware corporation,

Defendants. **ORDER**

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I. INTRODUCTION

Before the court is the Motion for Preliminary and Permanent Injunctions ("Motion"), filed by Plaintiff Goss International Corporation ("Goss") (docket no. 512).

II. BACKGROUND

On December 3, 2003, a jury returned a verdict in favor of Goss on its claims that Defendants Tokyo

Kikai Seisakusho, Ltd. and TKS (U.S.A.), Inc. (collectively "TKS") engaged in dumping in violation of the Antidumping Act of 1916, 15 U.S.C. § 72 (1994) ("1916 Act"). The jury awarded damages to Goss totaling $10,539,949.00. On December 4, 2003, pursuant to the 1916 Act's provision for treble damages, the court entered judgment in favor of Goss against TKS in the amount of $31,619,847.00, with intere t thereon at the rate provided in 28 U.S.C. § 1961, and costs. On June 2, 2004, the court awarded Goss attorneys' fees and expenses in the amount of $3,484,158.00 and taxed costs against TKS in the amount of $681,475.05.

On June 23, 2004, TKS filed a Notice of Appeal, in which it challenged all adverse rulings by the court.

On December 3, 2004, Congress repealed the 1916 Act. Miscellaneous Trade & Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2006(a), 118 Stat. 2434, 2597 (2004). However, Congress excluded all pending actions from the repeal. *Id.* § 2006(b). Therefore, the repeal does not affect this case. *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 434 F.3d 1081, 1083 (8th Cir.), *reh'g and reh'g en banc denied*, (8th Cir. 2006).

On December 8, 2004, a new law came into force in Japan. Law No. 162 is entitled *Amerika gasshuukoku no 1916 nen no han futuo renbai hou ni motoduki uketa rieki no henkan gimu tou ni kansuru tokubetsu sochi hou* or "Special Measures Law Concerning the Obligation of Return of the Benefits and the Like under the United States Antidumping Act of 1916" ("Japanese Special Measures Law"). The law, a so-

called "clawback statute," [1] authorizes Japanese parties, against whom a U.S. judgment has been rendered under the 1916 Act, to sue in Japan to recover the full amount of the judgment, interest and expenses, including attorney fees. Japanese Special Measures Law art. 3. It renders all wholly-owned parent companies and subsidiaries of the prevailing plaintiff in the U.S. action jointly and severally liable for the clawback judgment.[2] *Id.*

Pursuant to a stipulation filed by the parties ("2004 Stipulation"), in late 2004 the court ordered that (1) "TKS shall not file suit or assert or attempt to assert

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[1] Generally speaking, a clawback statute is a statute that enables a defendant who has paid judgment damages in an overseas country to recover that judgment from the successful plaintiff in the defendant's home country. See Joseph E. Neuhaus, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 Colum. L. Rev. 1097, 1097-98 (1981).

[2] The clawback statute is not unique to Japan. The European Union has a similar provision. On December 15, 2003, the European Council promulgated a similar clawback regulation. See Council Regulation (EC) No. 2238/2003 of December 15, 2003, O.J. (L 333). The European Council regulation authorizes nationals and residents of the European Union to sue for recovery of damages, costs and miscellaneous expenses suffered in the United States as a consequence of the 1916 Act from the plaintiff in the 1916 Act action or from certain entities related to that plaintiff. The clawback statutes were enacted because it is the position of Japan and the European Union that the 1916 Act violates the United States's obligations under a 1994 World Trade Agreement regarding antidumping legislation. *See generally Goss*, 434 F.3d at 1090 n.5 (discussing international legal aspects of 1916 Act).

any rights or remedies under the [Japanese Special Measures Law] . . . before all appeals, including without limitation any motion for rehearing or petition for certiorari, in this case are exhausted" and (2) "TKS shall provide Goss' counsel of record with fourteen (14) days' prior written notice before filing suit or asserting or attempting to assert any rights or remedies under the [Japanese Special Measures Law] . . . ."

On January 23, 2006, the Eighth Circuit Court of Appeals affirmed the court's judgment in all respects. *Goss*, 434 F.3d at 1099. On April 14, 2006, the Eighth Circuit Court of Appeals denied TKS's Motions for Rehearing and Rehearing En Banc. On June 5, 2006, the Supreme Court denied TKS's Petition for a Writ of Certiorari. *Tokyo Kikai Seisakusho, Ltd. v. Goss Int'l Corp.*, No. 05-1358, 74 U.S.L.W. 3619, 2006 WL 1130536 (U.S. June 5, 2006).

On June 5, 2006, hours after the Supreme Court denied TKS's petition for a writ of certiorari, TKS gave Goss notice that it intended to file suit and assert its rights under the Japanese Special Measures Law. Pursuant to the 2004 Stipulation and the court's order enforcing it, under the *status quo*, TKS may file suit in Japan under the Japanese Special Measures Law on June 19, 2006.

On June 8, 2006, Goss filed the instant Motion. On June 12, 2006, TKS filed a Resistance. On June 14, 2006, the court held a hearing ("Hearing") on the Motion, insofar as it requests a preliminary injunc-

tion.[3] Attorneys William Schopf and Ian Fischer represented Goss. Attorneys Peter Toren, Honken Seki, Donald Renaldo and Nicholas Critelli represented TKS. The Motion is fully submitted, and thus the court turns to consider it.

III. THE MERITS[4]

A. Summary of Argument

In the Motion, Goss asks the court for a foreign anti-suit injunction. That is, Goss requests a

> preliminary . . . injunction[] enjoining [TKS] and their representatives, officers, directors, agents, attorneys, employees, and shareholders, and anyone acting in concert with them, from asserting or attempting to assert or

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[3] At the Hearing, it became clear that, at this time, only the preliminary injunction is at issue. The court shall reserve ruling on the Motion insofar as Goss requests a permanent injunction. In due course, the court shall set a briefing schedule on the permanent injunction request.

[4] At the Hearing on TKS's Emergency Motion for Continuation of Stay of Enforcement of Judgment and to Preserve the Status Quo of the Ownership of Goss Japan ("Emergency Motion"), counsel for TKS stated that "our [M]otion would have been really better . . . phrased as conditions upon which [Goss's pending motion for] preliminary injunction should issue, if, in fact, the court were to issue a preliminary injunction enjoining TKS from bringing suit under the clawback statute in Japan." Counsel for TKS requested that, "rather [than] view it as a separate proceeding, as a separate request, if Your Honor would . . . respectfully consider it as part of the request that, should Your Honor issue the preliminary injunction . . . ." The court grants TKS's request, insofar as possible; it has reread the Emergency Motion and will attempt to present TKS's arguments in their best light.

> pursue any rights or remedies granted under [the Japanese Special Measures Law] against Goss or any of its affiliates or subsidiaries.

Goss contends that the Japanese Special Measures Law "directly attacks the [c]ourt's final jurisdiction and judgment." Goss points out that "the sole basis for Goss's liability under the Japanese [Special Measures Law] is Goss's receipt of damages awarded by this [c]ourt."

Goss contends an injunction is necessary to protect the court's jurisdiction and its judgment from "imminent danger of being invalidated and undone." Goss contends that it is fundamentally unfair for a company, like TKS, to do business in the United States for decades, intentionally violate the laws of the United States, litigate in the United States' federal courts for more than six years, and then "thumb its nose at this [c]ourt and the federal judiciary by taking advantage of special legislation in Japan . . . ." Goss points out that TKS recently announced its plans to continue to do business in the United States "for years to come" and to "compete vigorously for new business and services in the United States." (Hearing Exhibit 2).

TKS resists Goss's request for a foreign anti-suit injunction. TKS strenuously objects to Goss's characterization of its activities and denies it is "thumbing its nose" at the federal judiciary. TKS contends that Goss has not demonstrated that the court should grant a preliminary injunction. TKS urges the court to "respectfully decline to interfere with the judicial proceedings of a foreign sovereign."

B. Foreign Anti-Suit Injunctions Generally

The parties agree that the court has the equitable power to issue a foreign anti-suit injunction. "It is beyond question that a federal court may enjoin a party before it from pursuing litigation in a foreign forum." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004) (citing *China Trade & Dev. Corp. v. M.V. Choong Young*, 837 F.2d 33, 37 (2d Cir. 1987)); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004) (similar); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996) (similar); *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982) (similar); *see, e.g., Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660, 661-66 (8th Cir. 1981) (affirming district court's decision to grant preliminary injunction enforcing contractual agreement not to seek injunctive relief against the other party in foreign courts but permitting each to seek damages in foreign courts); *see also* Robin Cheryl Miller, Annotation, *Propriety of Federal Court Injunction Against Suit in Foreign Country*, 78 A.L.R. Fed. 831, § 2[a] (1986) ("A federal court's power to enjoin a party to a suit before the court from commencing . . . litigation in a foreign country is apparently unquestioned.").

The parties also agree that the All Writs Act, 18 U.S.C. § 1651, empowers the court to issue an injunction barring TKS from filing suit under the Japanese Special Measures Law. The All Writs Act grants the court the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and

agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *see, e.g., Phillips Beverage Co. v. Belvedere, S.A.*, 204 F.3d 805, 806 (8th Cir. 2000) (affirming district court's order, pursuant to the All Writs Act, that a party withdraw its application before the Customs Service because the application asked the Customs Service to do what the district court had already forbidden and the district court had an obligation to protect its judgment).

Even though a federal district court has the power to issue a foreign anti-suit injunction, it is not a power the court should exercise lightly or with abandon. "Determining the appropriateness of an international antisuit injunction is a highly nuanced exercise." *Quaak*, 361 F.3d at 16. "[P]rinciples of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'" *Paramedics*, 369 F.3d at 652 (quoting *China Trade*, 837 F.2d at 36)); *cf. Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964) ("Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time." (Footnote omitted.)). Clearly, a federal district court should not lightly interfere with judicial proceedings in other sovereign nations. The foreseen and unforeseen consequences of the court's actions are potentially myriad and may manifest themselves at an international level. *See* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 604 (1990) ("Judicial interference with a foreign country's exercise of

adjudicatory authority has a potential for embarrassing the political branches of government and disturbing our relations with that country.")

In sum, the court is cognizant that it must proceed with great caution before issuing a foreign anti-suit injunction—even if the injunction is issued only on a preliminary basis. A court must avoid a modern-day Scylla and Charybdis and "find a way to accommodate conflicting, mutually inconsistent national policies without unduly interfering with the judicial processes of a foreign sovereign." *Quaak*, 361 F.3d at 16 (citing *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 916. (D.C. Cir. 1984)). As the First Circuit Court of Appeals recently recognized, this difficult task is "particularly formidable given the absence of guidance from the Supreme Court," "the paucity of precedent[5]" and an apparent circuit-split. *Id.*; *see also id.* at 16-17 (discussing split between circuit courts of appeals). In this case, the court must navigate these troubled waters in just two days.[6]

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[5] Although the *Quaack* court was referring to the fact that there are few First Circuit Court of Appeals cases on point, matters are worse in the Eighth Circuit. The parties cite no on-point Eighth Circuit Court of Appeals cases; it appears the Eighth Circuit Court of Appeals has never had the occasion to discuss the standards for issuing a preliminary foreign anti-suit injunction. *But see Medtronic*, 664 F.2d at 661-66 (affirming grant of foreign anti-suit injunction).

[6] Despite several abortive efforts, the parties called the undersigned this afternoon and informed her that they were unable to reach an agreement to give the court more time to consider this matter.

C. Standards for Granting a Preliminary Injunction: Dataphase *factors*

In the Eighth Circuit, applications for preliminary injunctions are generally measured against the standards set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). *See Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 444 F.3d 991, 994 (8th Cir. 2006) (applying *Dataphase* factors).[7] The party moving for a preliminary injunction has the burden of establishing

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[7] A number of other circuit courts of appeals have rejected the usual standards for measuring the merits of an application for a preliminary injunction in the context of an application for a foreign anti-suit injunction. *See, e.g., Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negari*, 335 F.3d 357, 364 (5th Cir. 2003) ("Although both the district court and the parties discussed all four prerequisites to the issuance of a traditional preliminary injunction, the suitability of such relief ultimately depends on considerations unique to antisuit injunctions."); *see also E&J Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 990-91 (9th Cir. 2006) (adopting Fifth Circuit approach and holding that movant "need not meet our usual test of a likelihood of success on the merits of the underlying claim" but instead "need only demonstrate the factors specific to an anti-suit injunction weigh in favor of granting the injunction"). These courts have narrowed the inquiry to whether the movant is likely to succeed on the merits, considering a number of factors specific to the propriety of anti-suit injunctions. *Karaha*, 335 F.3d at 364 n.19. Because the Eighth Circuit Court of Appeals has not yet carved out such an exception to *Dataphase*, the court shall consider all four *Dataphase* factors. This decision is immaterial in the present case, however, because the court shall find that all four *Dataphase* factors weigh in favor of the issuance of a preliminary injunction.

entitlement to such relief. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (citing *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989) (en banc)). The court must consider four factors: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the grant of a preliminary injunction is in the public interest. *Dataphase*, 640 F.2d at 114. "None of these factors by itself is determinative; rather, in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986). A party moving for a preliminary injunction is required to establish a sufficient threat of irreparable harm. *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996). The district court has broad discretion when ruling on requests for preliminary injunctions and a reviewing court will reverse only for an abuse of discretion, clearly erroneous factual determinations or the application of an incorrect legal standard. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998).

The court now turns to consider the four *Dataphase* factors.

1. Likelihood of success on the merits

The first factor the court must consider under *Dataphase* when ruling on Goss's Motion is the likelihood or probability of success on the merits. *Pottgen v.*

Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994). In considering this factor, the court need not decide whether Goss ultimately will succeed on the movant's claims. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991). Rather, the movant's success on the merits must be "at least . . . sufficiently likely to support the kind of relief it requests." *Sanborn Mfg. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 488 (8th Cir. 1993). Thus, a showing of likelihood of success on the merits requires simply that the moving party find support for its position in the governing law. *Baker Elec. Co-op*, 28 F.3d at 1473-74.

a. Preliminary considerations

Goss contends that because it has prevailed on the merits of its claims under the 1916 Act, it has "already prevailed on the merits," and thus the first *Dataphase* factor weighs in favor of granting a preliminary injunction. The court cannot accept this argument. Goss's request for a permanent injunction and its original Complaint alleging a violation of the 1916 Act are separate legal issues—indeed, the latter was resolved at all levels of the federal judiciary days before the former was even filed. The court agrees with TKS that the correct question before the court on this *Dataphase* factor is "whether Goss is likely to prevail on its motion for an anti-suit injunction." *See In re Y & A Group Sec. Litig.*, 38 F.3d 380, 383 (8th Cir. 1994) ("A preliminary injunction will only be issued where it appears that the petitioner is likely to succeed on the merits in proving that a permanent injunction is warranted"). The court shall thus consider the traditional standards by which courts have

determined whether to grant foreign anti-suit injunctions. *See Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negari*, 335 F.3d 357, 364 (5th Cir. 2003) (equating likelihood of success on merits standard with traditional standards by which courts have decided to grant foreign anti-suit injunctions); *see also Dataphase*, 640 F.2d at 113 ("At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.").

The Eighth Circuit Court of Appeals has not had the opportunity to indicate what standards apply for the issuance of foreign anti-suit injunctions. It is settled, however, that a foreign anti-suit injunction is only appropriate if the foreign litigation involves the same issues and parties as the federal action and if the federal action is dispositive of the foreign litigation. *E.J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 991 (9th Cir. 2006); *Paramedics*, 369 F.3d at 652; *Quaak*, 361 F.3d at 18; *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955 (D. Minn. 1981) ("The parties must be the same; the issue must be the same; and the resolution of the first action must be dispositive of the action to be enjoined." (Citations omitted.)), *aff'd on other grounds*, 664 F.2d 660 (8th Cir. 1981); *see also Cargill*, 531 F. Supp. at 715 ("The threshold question is whether the parties are the same in both actions, the issues are the same, and resolution of the first action will be dispositive of the action to be enjoined."). In this case, the issues are the same and the United States action is dispositive of the foreign litigation. As Goss points out, the sole basis for

Goss's liability under the Japanese Special Measures Law is Goss's receipt of damages awarded by this court. The judgment and jurisdiction of this court is thus intimately tied to any future action TKS might file under the Japanese Special Measures Law. The court also finds that the parties are the same. It is immaterial that the target of TKS's suit in Japan would in the first instance be Goss Japan, because Goss Japan is a subsidiary of Goss. *Medtronic*, 518 F. Supp. at 955.

b. Circuit split

Beyond this threshold question, there is presently a circuit split as to what factors a court must consider before issuing an anti-suit injunction. *See Quaak*, 361 F.3d at 17 (discussing differences between the so-called "liberal approach," which the Fifth and Ninth Circuit Courts of Appeals have adopted, and the so-called "conservative approach," which the First, Second, Third, Sixth and D.C. Circuit Courts of Appeals have adopted) (reiterating nomenclature set forth in Note, *Antisuit Injunctions and International Comity*, 71 Va. L. Rev. 1039, 1049-51 (1985)); *see also Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992) (similarly recognizing circuit split). The difference between the two approaches concerns how much weight the court should give to considerations of international comity. *See id. Compare Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996) (inquiring as to whether international anti-suit injunction would "actually threaten relations" between nations), *with Quaak*, 361 F.3d at 18-19 (holding that courts must consider "the totality of the circumstances" and determine whether there is

sufficient evidence to overcome a "rebuttable presumption" against international anti-suit injunctions). The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *accord Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.").

c. Analysis

The court finds that, under either the liberal or the conservative approach, Goss has met its burden. Even among those courts that afford international comity the greatest respect, it is settled that considerations of comity have diminished force when, as here, one court has already reached judgment. *See Paramedics*, 369 F.3d at 655 ("[W]here one court has already reached a judgment—on the same issues, involving the same parties—considerations of comity have diminished force."). As the D.C. Circuit explained:

> Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effective-

> ness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.
>
> These situations may arise either before or after a judgment has been entered. The policies that guide the exercise of discretion vary slightly in each situation. When the injunction is requested after a previous judgment on the merits, there is little interference with the rule favoring parallel proceedings in matters subject to concurrent jurisdiction. Thus, a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation.

Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927-928 (D.C. Cir. 1984) (footnotes omitted). Similarly, the First Circuit Court of Appeals writes:

> Where . . . a party institutes a foreign action in a blatant attempt to evade the rightful authority of the forum court, the need for an antisuit injunction crests. *See Laker Airways*, 731 F.2d at 929-30. . . . In technical terms, [the foreign action] may not constitute a frontal assault on the district court's jurisdiction, but the practical effect is the same. That is a matter of considerable import: a court has a right—indeed, a duty—to preserve its ability to do justice between the parties in cases that are legitimately before it. *See id.* at 930; *see also Davis*, 767 F.2d at 1039 (upholding an antisuit injunction as "necessary to ensure a complete adjudication of the matter before it").

Quaak, 361 F.3d at 20; *accord Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1324-25 (11th Cir. 2004) (affirming district court's decision to permanently enjoin offshore insurers from litigating on the Isle of Man because the district court had already issued judgment on the merits and the "'only conceivable benefit that [the foreign defendants] would reap if the district court's injunction were overturned would be the right to attack the pending United States action in a foreign court.'" (quoting *Laker Airways*, 731 F.2d at 915)).

The court finds that TKS's intended invocation of the Japanese Special Measures Law is a direct attack on this court's judgment in favor of Goss and a frontal assault on the jurisdiction of this court and the federal judiciary as a whole. "[A] direct interference with the jurisdiction of [an] United States court justifie[s] the defensive issuance of an antisuit injunction . . ." *Gau Shaun*, 956 F.2d at 1356 (citing *Laker Airways*, 731 F.2d at 915). In effect, TKS seeks to institute a lawsuit "for the sole purpose of terminating" this court's judgment in Goss's favor, thereby in a single filing attempting to undo six years of federal court litigation. *See id.* (discussing *Laker Airways*). The court finds TKS's proposed litigation in Japan, after six years of litigation in the Untied States, is clearly vexatious and oppressive.

The court does not dispute the affidavit testimony of TKS's expert, Professor George Bermann, who opines that the issuance of an anti-suit injunction in this case would be deeply offensive to the Japanese government. The court is aware that the issuance of a preliminary injunction in this case may have interna-

tional repercussions. Weighing all the factors and looking at this case in its procedural context, however, the court finds that its interest in protecting the integrity of its judgments and jurisdiction outweighs concerns over international comity.

The court's conclusion is strengthened by the unique circumstances of this case. The court's decision is consistent with the decisions of the legislative and executive branches of the United States government. When Congress passed the bill repealing the 1916 Act and the President signed it, the legislative and executive branches deliberately chose to enact a law that operates prospectively. Miscellaneous Trade & Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2006(b), 118 Stat. 2434, 2597 (2004). Moreover, Congress was aware of this particular case, the jury's award and that the defendant was a Japanese company. *See* H.R. Rep. 108-415, at 17 (2004) ("The only 1916 Act case now pending is an Iowa case in which a jury found $10.5 million in actual damages against a Japanese company on December 3, 2003."). Congress and the President were also presumably aware that the Japanese government wanted a retroactive repeal of the 1916 Act. It was and remains the position of the Japanese government that the 1916 Act and this court's judgment was and is in violation of the United States' obligations as a member of the World Trade Organization. *See* Statement of Senator Charles Grassley, Statements on Introduced Bills and Joint Resolutions (Senate, May 23, 2003), available at http://thomas.loc.gov; Bermann Declaration, *passim*. The fact that the legislative and executive branches were aware of this court's judgment and deliberately

chose *not* to undo it through a retroactive repeal of the 1916 Act must inform the weight this court must give to international comity in this case. It is not the province of this court or the federal judiciary in general to rewrite the foreign policy of the United States government, as expressed by the legislative and executive branches of government. A recent discussion from the Eighth Circuit Court of Appeals, albeit in a different context, is instructive:

> Applying *Dataphase*, we look at the public's interest and the balance of the harms caused by a grant of injunctive relief on the one hand, and a failure to grant injunctive relief on the other. On these two factors, we give great weight to the fact that Congress already declared the public's interest and created a regulatory and enforcement framework that balanced the need for regulation against the harm of closure. As noted by the Supreme Court:
>
> > "[a] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation. A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."

In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 760 (quoting *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497-98 (2001) (internal citations and quotation marks omitted)).

Accordingly, the court finds the first *Dataphase* factor, likelihood of success on the merits, weighs in favor of granting a preliminary injunction in this case.

2. Threat of irreparable harm

The next factor the court must consider is the degree of irreparable harm, if any, Goss would suffer if the court does not grant the preliminary injunction. The party moving for a preliminary injunction generally may show irreparable harm by showing that the movant has no adequate remedy at law. *United States v. Grand Labs, Inc.*, 174 F.3d 960, 965 (8th Cir. 1999). Proof that an adequate legal remedy, such as a damages claim, exists supports an inference that no irreparable harm will occur. *Moore Business Forms, Inc.* v. Wilson, 953 F. Supp. 1056, 1062 (N.D. Iowa), *aff'd*, 105 F.3d 663 (8th Cir. 1996). The fact that a valid damages claim is available does not necessarily foreclose the issuance of injunctive relief, however, because money damages may not fully compensate a movant for less tangible injuries. *Id.*

The court finds that Goss would suffer great harm if the court does not grant the preliminary injunction. This harm is not limited to TKS's ability to clawback the judgment at issue from Goss's Japanese subsidiary, Goss Japan. At the Hearing, Goss's executive vice-president, chief financial officer and secretary,

Joseph Patrick Gaynor, III, testified. Mr. Gaynor is a member of the Board of Directors of Goss Japan. Mr. Gaynor testified that Goss Japan is currently running a "break even operation." If TKS sues Goss Japan under the Japanese Special Measures Law, lenders might balk at loaning Goss Japan money. Goss Japan's customers—in essence its unsecured creditors—would be wary to advance money for Goss Japan's products. Based on Mr. Gaynor's testimony and the court's own common sense, the court finds that the Japanese Special Measures Law poses a threat to the survival of Goss Japan and would thus harm Goss.

Accordingly, the court finds the second *Dataphase* factor, the threat of irreparable harm, weighs in favor of granting a preliminary injunction in this case.

3. Balance of harms

The court finds the threat of irreparable harm to Goss in this case outweighs the harm to TKS that may be occasioned by its inability to avail itself of the Japanese Special Measures Law while the court considers Goss's Motion for Permanent Injunction. The court will rule upon the Motion for Permanent Injunction expeditiously. This factor, therefore, weighs in favor of the issuance of the requested preliminary injunction.

4. Public interest

The final factor the court must consider in determining whether to issue the requested preliminary injunction is whether public interest favors preventing

TKS from availing itself of the Japanese Special Measures Law while the court considers Goss's Motion for Permanent Injunction. The court finds that it does. The court incorporates by reference its discussion and findings regarding Congress's repeal of the 1916 Act in its analysis of the first *Dataphase* factor. It is clear that the public has an interest in preserving the jurisdiction of the federal judiciary. Moreover, the legislative and executive branches, acting in the public interest, have determined that the court's judgment should be enforced. This factor therefore weighs in favor of the issuance of the requested preliminary injunction.

5. Conclusion

Because all four *Dataphase* factors weigh in favor of the issuance of a preliminary injunction, the court shall grant Goss's Motion. The court stresses, however, that it does not purport to enjoin the government of Japan or the Japanese judiciary; rather, it is enjoining TKS from availing itself of the Japanese Special Measures Law. Even so, the court does not enjoin a party from availing itself of a foreign remedy lightly. The court also stresses that this is only a "preliminary assessment" pending consideration of Goss's request for a permanent injunction. *Medtronic*, 664 F.2d at 665. The court recognizes that "[t]he equities of this situation . . . may change." *Id.* The court finds, however, that, at this moment, justice requires it to intervene to preserve the *status quo* until the merits of Goss's request for a permanent injunction are determined after fuller consideration.

IV. DISPOSITION

Goss's Motion for Preliminary and Permanent Injunctions (docket no. 512) is **GRANTED IN PART**. The court grants Goss's Motion insofar as it requests a preliminary injunction. The court enjoins TKS and their representatives, officers, directors, agents, attorneys, employees, and shareholders, and anyone acting in concert with them, from asserting or attempting to assert or pursue any rights or remedies granted under the Japanese Special Measures Law against Goss or any of its affiliates or subsidiaries. The court **RESERVES RULING** on Goss's Motion insofar as it requests a permanent injunction. The court shall establish an orderly briefing schedule on the Motion in the near future.

IT IS SO ORDERED.

DATED this 15th day of June, 2006.

S/LINDA R. READE

JUDGE, U.S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 5, 2006

Mr. William G. Schopf, Jr.
Schopf & Weiss LLP
312 West Randolph Street
Suite 300
Chicago, IL 60606

Re: Tokyo Kikai Seisakusho, Ltd., et al.
v. Goss International Corporation, et al.
NO. 05-1358

Dear Mr. Schopf:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

s/William K. Suter, Clerk

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2604

Appeal from the United States District Court for the Northern District of Iowa

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Goss International Corporation, formerly known as Goss Graphic Systems, Inc., a Delaware corporation,

Plaintiff/Appellee,

v.

Man Roland Druckmaschinen Aktiengesellschaft, a German corporation; Man Roland, Inc., a Delaware corporation; Koenig & Bauer Aktiengesellschaft, a German corporation; KBA North America, Inc., a Delaware corporation,

Defendants,

Tokyo Kikai Seisakusho, Ltd., a Japanese corporation; TKS (U.S.A.), Inc., a Delaware corporation,

Defendants/Appellants,

Mitsubishi Heavy Industries, Ltd., a Japanese corporation; MLP U.S.A., Inc., a Delaware corporation,

Defendants,

The Government of Japan,

Amicus on Behalf of Appellants.

Submitted: March 4, 2005
Filed: January 23, 2006

Before RILEY, SMITH, and BENTON, Circuit Judges.

RILEY, Circuit Judge.

This case involves a multi-national dispute involving sales of large printing press equipment in the United States. Ultimately, this appeal asks whether a foreign corporation merely competed with a domestic manufacturer in the printing press industry in the United States, or whether the foreign corporation intended to injure or destroy the printing press industry in the United States by dumping underpriced products onto that market.

Goss International (Goss), a United States corporation, sued Tokyo Kikai Seisakusho (TKSC), a Japanese corporation, its United States subsidiary, TKS (U.S.A.) (collectively, TKS), and other foreign corporations and their United States subsidiaries (collectively, the other defendants), alleging violations of the

Antidumping Act of 1916 (1916 Act), 15 U.S.C. § 72.[1] Before trial, the other defendants moved to dismiss Goss's complaint because it failed to allege predatory intent as required under domestic antitrust law. Concluding the 1916 Act does not require predatory intent, the district court[2] denied the motions to dismiss. The other defendants then settled with Goss and are no longer parties to this lawsuit. Goss's claims against TKS were tried to a jury, which found TKS unlawfully dumped printing press equipment onto the United States market in violation of the 1916 Act. The jury awarded $10,539,949 in damages to Goss. Because the 1916 Act provides for treble damages, the district court[3] tripled the award and entered judgment against TKS for $31,619,847. The district court also

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[1] Unlawful dumping occurs when a foreign person "commonly and systematically . . . sell[s] . . . [imported] articles within the United States at a price substantially less than the actual market value or wholesale price of such articles [less incidental import expenses], at the time of exportation to the United States, in the principal markets of the country of their production . . . [when such] acts be done with the intent of destroying or injuring an industry in the United States." 15 U.S.C. § 72.

In 2004, Congress repealed the 1916 Act. Miscellaneous Trade & Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2006(a), 118 Stat. 2434, 2597. However, Congress specifically excluded any actions pending at the time of the repeal. Id. § 2006(b). Because Goss's claims against TKS were pending at the time Congress repealed the 1916 Act, the repeal does not affect this appeal.

[2] The Honorable Michael J. Melloy, then United States District Judge for the Northern District of Iowa, now United States Circuit Judge for the Eighth Circuit Court of Appeals.

[3] The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

awarded attorney fees to Goss in the amount of $3,484,158. TKS filed a motion for new trial and a motion for judgment as a matter of law. The district court denied both of TKS's post-trial motions.

TKS appeals, contending (1) the district court misinterpreted the 1916 Act as not requiring proof of predatory intent; (2) the district court misinstructed the jury on the essential elements of Goss's claims; (3) sufficient evidence does not support the jury's verdict on Goss's claims involving the price erosion theory; (4) the district court erroneously excluded evidence about Goss's reputation in the newspaper industry; (5) sufficient evidence does not support the jury's verdict that TKS dumped products onto the United States printing press market that were comparable to the products TKS sold in Japan; and (6) the district court misapplied the statute of limitations and erroneously allowed Goss to recover on a time-barred claim. We affirm.

I. BACKGROUND

Because Goss secured a jury verdict, we provide the following background based on the record viewed in a light most favorable to the jury's verdict and by giving all reasonable inferences to Goss. See Racicky v. Farmland Indus., Inc., 328 F.3d 389, 393 (8th Cir. 2003).

Goss manufactures and supplies large newspaper printing presses, newspaper printing press additions, and other printing press systems for sale to large newspapers. TKS manufactures large newspaper printing presses and newspaper printing press addi-

tions in Japan, and then distributes its products around the world, including in the United States. A typical large printing press system is over 100 feet long, stands four or five stories tall, and weighs two million pounds. Once a large printing press is installed, it oftentimes is referred to as an installed base. Because the installed base, i.e, the actual printing press system, is so large and expensive, many customers prefer to purchase printing press additions from the manufacturer of the original printing press system. This is often referred to as the installed base advantage. Because of the size and cost of these systems, newspapers often use their existing printing press systems for decades, and only update the capability of the presses by purchasing printing press additions. When a newspaper decides to buy a large printing press system or a printing press addition, price is the primary factor; in head-to-head battles between manufacturers dealing in comparable equipment, price can be the determinative factor. However, non-price factors also can be important in choosing a manufacturer. This case deals exclusively with printing press additions.

The United States market for large printing press equipment is rather small, with only about ten sales taking place each year. Because the market is so compact, lost orders–even one per year–can impact a substantial portion of a manufacturer's business. Beginning in the 1970s, Goss became the dominant manufacturer of newspaper printing press equipment in the United States. By the 1990s, Goss was the only domestic manufacturer of large printing presses in the United States. Goss's dominance of the United States

printing press industry continued into the late 1990s. However, in 2000, Goss did not make a single sale of printing press equipment.

TKS enjoys a huge market in Japan for its printing press equipment. TKS broke into the United States printing press market in the 1970s. By the late 1970s or early 1980s, Goss noticed TKS was a major foreign competitor in the United States market. By the 1990s, TKS had a significant installed base in the United States of around sixty-two printing presses. In the 1980s, TKS landed major newspaper customers in the United States. These customers included *The Wall Street Journal*, *The Washington Post*, and the *Newark Star-Ledger*. TKS also established a critical relationship with *The Dallas Morning News*, which TKS planned to use to showcase its products to other United States newspapers. From 1985 to 2000, TKS's market share of the United States printing press industry fluctuated from highs of 22.4% in 1986 and 20.4% in 1998 to 0% in 2000.

From January 1991 to July 2000, TKS sold over $125,000,000 worth of printing press additions to five United States newspapers. According to Goss's expert witness at trial, all of these sales were dumped, i.e., they were "common and systematic," and TKS sold these "product[s] in the U.S. at a price that was substantially below the market value of the similar product in Japan." When TKS, a major competitor in the United States printing press market, lowered its prices, customers expected Goss to lower its prices as well.

This appeal focuses on three separate sales of printing press additions to three separate United States newspapers. Goss presented evidence showing it lost the sale of printing press additions to *The Dallas Morning News* in 1996 because TKS won the contract based on dumped prices. Goss also presented evidence that, although it successfully won the sales of printing press additions to the *Orlando Sentinel* and the *Newark Star-Ledger* in 1997, it lowered its prices to compete with TKS's dumped prices. That is, Goss showed the contract costs of the additions with these two newspapers, but also showed the jury "the price that Goss would have made–or would have received but for TKS offering bids at its dumped prices."

In 1994, TKS executed a contract with *The Dallas Morning News* for the sale of three printing press additions for $8,505,348. The contract also provided an option for *The Dallas Morning News* to buy two more additions at a later date for $5,670,232. In a letter dated April 25, 1995, *The Dallas Morning News* exercised its option to purchase the two additions. TKS later determined the option agreement obligated it to supply *The Dallas Morning News* "the two additional units at a clearly dumped price." In response, TKS asked *The Dallas Morning News* to agree to an option price of $7,429,774 for the additional units, with the understanding TKS would rebate the increased amount to *The Dallas Morning News*. In a letter dated June 13, 1996, TKS wrote to *The Dallas Morning News* informing it of this agreement. In late 1996, TKS and *The Dallas Morning News* executed a contract for the sale of the two additions, and TKS

delivered those additions. TKS then rebated $2,200,000 to *The Dallas Morning News*, with $1,000,000 being reimbursed by check and $1,200,000 being reimbursed in the form of free equipment. In a letter to TKS (U.S.A.) dated August 12, 1996, and referencing the option contract with *The Dallas Morning News* for the two additions, TKSC's overseas sales manager wrote, "Today we received with a big surprise a copy of the letter dated June 13, 1996. . . . there should not be such a document (stating TKS/USA will issue a credit and or cash in the amount of $2,200,000 to The Dallas Morning News before December 31st, 1996) approved by 3 parties (DMN, TKS/USA and TKS, Ltd)."

In discussing how to memorialize the agreement that TKS would reimburse *The Dallas Morning News* $2,200,000 for the additional contract amount for the option items so the original 1994 price would end up being the total price, TKS's attorney wrote *The Dallas Morning News*, "I HOPE WE CAN DISPENSE WITH ANY WRITTEN CONFIRMATION OF THIS 'GENTLEMAN'S AGREEMENT'. A HAND-SHAKE DEAL IS THE BEST." A confidential fax dated August 1996 references the June 13, 1996, letter, asking if "a copy or duplicate original copy of the letter" exists and, "[i]f so, we suggest that such a copy must be collected and destroyed." A subsequent confidential fax reiterates the command to "destroy all copies of the said original letter that are located at TKS (USA)." TKSC's overseas sales manager sent *The Dallas Morning News* a copy of a fax describing the $2,200,000 in rebates, and then instructed him, "This fax copy is only for your information. I did not talk about this old story with

TKS people. . . . Please destroy this fax letter after you read it." Finally, a document admitted at trial showed TKSC advised TKS (U.S.A.) "all documents and *Faxes* relevant to [*The Dallas Morning News* dumping] matter should be disposed of whenever possible, but it's probably inevitable that some copies remain."

In 1997, Goss won a contract for the sale of printing press additions to the *Newark Star-Ledger* for $16,995,000, but contended that represented "a loss position of about 5 million dollars." Goss's national sales manager testified that, if Goss "had not been dealing with dumped pricing, [it] could [have] derive[d] a price between 27 and 25 million dollars for this order." Goss's sales manager further testified, "If we had not been dealing with dumped prices from [TKS], we should have been able to turn that type of profit from this order. Instead of being a loss position of 5 million, we should have made . . . 3 million dollars profit."

In a letter dated January 21, 1997, from TKS (U.S.A.) to TKSC regarding the competition for the sale of printing press additions to the *Newark Star-Ledger*, TKS (U.S.A.) stated, "[W]e feel that [the *Newark Star-Ledger*] will feel that $9.4 million plus installation will be too high a price and may reluctantly get proposals from Goss and [another manufacturer for the printing press additions]. If so, we are in danger of losing [the] order." Thus, TKS (U.S.A.) offered the following strategy:

> We would provide a written proposal showing conversion parts price of $1.0 million more–$5,200,648, and <u>verbally</u> tell customer that if dumping problem was not involved, our

> [equipment] would be $8,431,481. . . . Therefore, we would tell [the *Newark Star-Ledger* representative] if he will permit us to add $1.0 million to $8,431,481–making the Sales Agreement price $9,431,481, we would reduce conversions price by $1.0 million to become $4,200,648.

(emphasis in original).

Also in 1997, Goss outbid TKS on the sale of printing press additions to the *Orlando Sentinel*. Referring to the sale of those additions, Goss's national sales manager testified the contract price totaled $13,215,650. However, this witness stated that, had it not been for TKS's dumped prices impacting this order, Goss could have sold these additions for $14,938,000.

Goss's expert witness studied TKS's pricing of its printing press additions offered in the United States, and determined TKS offered these printing press additions at dumped prices. This witness testified Goss's four sales of printing press additions while competing head-to-head against "TKS during [the 1990s] when TKS was offering dumped prices" were made at lower prices "than they would have been but for TKS offering those [dumped] prices."

In a letter dated December 17, 1993, TKSC's manager of its overseas sales department wrote to TKS (U.S.A.) regarding a sale to *The Dallas Morning News*, and stated,

> If Goss wants to sling mud at TKS in such dirty strategy (special 25% discount or one tower as gift to sell 3 towers) to destroy TKS,

> I believe TKS must do something like an eye for an eye, a tooth for a tooth. Look here, Goss, TKS will show them a thing or two–three–four . . . . . in Japan, Asia, U.S.A. & in any other territory *until TKS wins completely this survival game.*"

(emphasis added).

In a videotaped deposition, a TKS (U.S.A.) senior manager of customer service stated TKS considered Goss the enemy. In a letter from TKSC to TKS (U.S.A.) dated July 14, 1994, concerning another sale of printing press additions, TKSC stated, "[P]lease do your best to *get this order by all means.* It must be very beautiful, if we can see two (2) TKS [printing press additions on top of] Goss presses in East coast and in West coast in U.S.A." (emphasis added).

In a letter dated September 27, 1996, from TKSC to TKS (U.S.A.) addressing a German manufacturer's impact on Goss's business, TKS stated,

> Our good rival [i.e., the German manufacturer] is fighting bravely, we must admit it. Well done!! I am very happy to hear from you that Goss is in a vulnerable position at present . . . having no U.S. backlog in a factory–having to issue $300M in bonds. They invited their own misfortunes. It is no more than they deserved. Congratulations!!

TKSC's assistant general manager of the sales division testified he was "happy" when he heard the news in June 1996 that Goss was closing its main manufacturing plant for a couple of weeks and laying off employees.

In March 2000, believing TKS and the other defendants had been unlawfully dumping printing press additions onto the United States market in violation of the 1916 Act, Goss sued TKS and the other defendants in the Northern District of Iowa. Focusing on the allegations against TKS, Goss alleged

> [f]or years [TKS] ha[s] offered and sold Newspaper Presses and Newspaper Press additions in the United States at prices substantially less than their actual market value in other countries, after adding freight, tariffs, and other charges and expenses. [TKS has] undertaken this conduct–called 'dumping'–in a deliberate effort to destroy or injure the United States Newspaper Press industry.

At trial, Goss maintained ten sales of printing press additions were affected by TKS's unlawful dumping. Specifically, Goss argued TKS won six sales based on unlawful dumping, while Goss won four sales by eroding its profit margin to compete with TKS's unlawful dumping. This theory is referred to as the price erosion theory. Because of statute of limitations issues, the jury was asked whether TKS violated the 1916 Act on six specific sales of printing press equipment–two sales won by TKS, and four sales won by Goss.

After an eleven-day trial, the jury found TKS engaged in unlawful dumping. To make this determination, the jury found Goss proved (1) TKS "commonly and systematically imported or sold, or caused to be imported or sold, newspaper press printing units within the United States at a price substantially less

than the actual market value or wholesale price, at the time of exportation to the United States, of comparable printing units in Japan," (2) "such acts were done with the intent of injuring or destroying an industry in the United States," and (3) "Goss was injured in its business or property by reason of [TKS]'s conduct." Although Goss claimed it lost two sales of printing press additions because of TKS's unlawful dumping, the jury found for Goss only on *The Dallas Morning News* claim. On this claim, the jury concluded Goss's damages included lost profits in the amount of $840,720, and the opportunity cost of capital relating to lost profits in the amount of $551,770. Goss also claimed TKS's unlawful dumping caused Goss to suffer price erosion damages on four sales Goss actually won. The jury found for Goss only on its sales to the *Orlando Sentinel* and to the *Newark Star-Ledger*. On the *Orlando Sentinel* claim, the jury found Goss's damages included lost profits in the amount of $1,060,420, and the opportunity cost of capital relating to lost profits in the amount of $637,366. On the *Newark Star-Ledger* claim, the jury found Goss's damages included lost profits in the amount of $4,844,019, and the opportunity cost of capital relating to lost profits in the amount of $2,605,654. Based on these findings, the jury's total damages award to Goss amounted to $10,539,949.

Because the 1916 Act provides for treble damages, 15 U.S.C. § 72, the district court entered judgment in Goss's favor and against TKS for $31,619,847. The district court also awarded statutory attorney fees to Goss in the amount of $3,484,158. TKS sought post-trial relief by filing a motion for a new trial and a

motion for judgment as a matter of law. In its motion for new trial, TKS contended (1) the jury verdict was against the weight of the evidence; (2) the district court issued improper jury instructions; and (3) the district court made erroneous evidentiary decisions. In its motion for judgment as a matter of law, TKS argued (1) Goss failed to meet its burden of proof; and (2) there was no evidentiary basis for the jury's finding of injury. The district court denied both motions. TKS appeals.

II. DISCUSSION

We review de novo the district court's denial of TKS's motion for judgment as a matter of law. Racicky, 328 F.3d at 393. We ask whether the record contains sufficient evidence to support the jury's verdict in Goss's favor. Id. When considering this sufficiency of the evidence question, we examine the evidence in a light most favorable to Goss and view all inferences in its favor. Id. We remain vigilant when reviewing a jury's verdict, knowing judgment as a matter of law in the face of a jury's verdict is appropriate only when the evidence points in one direction and no reasonable inferences support Goss's claims. Id.

When reviewing a district court's denial of a motion for a new trial, we afford great deference to the district court and will not reverse without a showing that the district court clearly abused its discretion. Children's Broad. Corp. v. Walt Disney Co., 357 F.3d 860, 867 (8th Cir. 2004). The standard is even more strenuous "[w]hen the basis of the motion for a new trial is that the jury's verdict is against the weight of

the evidence," as the denial of the motion under these circumstances "is virtually unassailable on appeal." Id.

A. Anti-Dumping Act of 1916

Nearly ninety years ago, Congress passed the 1916 Act to outlaw dumping practices intended to injure or destroy United States industry:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, *commonly and systematically* to import, sell or cause to be imported or *sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production*, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be *done with the intent of destroying or injuring an industry in the United States*, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on

> conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.*

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

15 U.S.C. § 72 (emphasis added).

1. The 1916 Act and Any Intent Requirement

TKS urges us to interpret the 1916 Act to require predatory intent along the lines the Supreme Court enunciated in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). In Brooke Group, 509 U.S. at 219-24, the Court interpreted the price discrimination provision of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act, as requiring predatory intent such that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate mea-

sure of its rival's costs," and "that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." However, TKS does not urge us to adopt "the entire Brooke Group predatory pricing test, but only that the [1916] Act is governed by the general standard articulated in Brooke Group that a defendant must act to 'eliminate or retard competition' to gain control over prices." See Brooke Group, 509 U.S. at 222 (holding the essence of a price discrimination claim is that a "business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market"). In a doomsday prediction, TKS contends the district court's interpretation of the 1916 Act, which rejected an additional element of predatory intent, "improperly converted the [1916 Act] . . . into an appallingly anti-competitive law that domestic manufacturers can and will use to punish and thereby stifle legitimate competition from foreign manufacturers[4]." Thus, we ask whether the plain language of the 1916 Act requires a showing of predatory intent.[5]

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[4] Of course, TKS's argument has little weight in light of Congress's repeal of the 1916 Act. To our knowledge, this litigation is the lone pending lawsuit under the 1916 Act in the Eighth Circuit.

[5] The Government of Japan filed an amicus brief in this appeal, contending the 1916 Act violates the United States's obligations under a 1994 World Trade Organization (WTO) agreement concerning antidumping legislation. Specifically, Japan argues

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The district court confronted this predatory intent issue. Goss Graphic Sys., Inc. v. MAN Roland Druckmaschinen AG, 139 F. Supp. 2d 1040, 1045 (N.D. Iowa 2001). Judge Melloy concluded the "contention that a plaintiff must show predatory intent .

(...continued)
the 1916 "Act violates the WTO agreement and every action allowed to proceed under the [1916] Act exacerbates the United States' breach of its obligations under the agreement." Japan notes the European Union already has been authorized by the WTO to enact countermeasures against the United States based on the application of the 1916 Act to a German corporation. Japan threatens,

> If the verdict in this case is upheld, Japan may have no choice but to seek authorization from the [WTO's Dispute Settlement Body] to impose its own countermeasures against the United States, which could include the imposition of additional duties on U.S. imports into Japan. Thus, the failure of the United States to comply with the WTO ruling and recommendation could result in an 'arms buildup of protectionist measures' that could threaten to disrupt trade and commerce between Nations.

Japan argues our court should interpret the 1916 Act to minimize the impact on the United States's foreign relations and to be consistent with the United States's obligations to the WTO. Specifically, Japan urges this court to interpret strictly the 1916 Act's intent element to require proof of predatory intent to "minimize[] the United States' breach of its obligations under the WTO Agreement." Although we recognize this dispute under the 1916 Act may have international ramifications, those potential ramifications cannot transform the 1916 Act into something it is not. Following our judicial duty, our resolution of the intent requirement under the 1916 Act is based on American law and not foreign policy. As discussed below, our reading of the 1916 Act forces us to conclude it does not require proof of predatory intent as contemplated in antitrust laws.

. . is simply not supported by the plain and unambiguous language of the 1916 Act." Id. at 1046. Other district courts also have held the 1916 Act does not require proof of predatory intent as contemplated by the Supreme Court in Brooke Group. See, e.g., Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 35 F. Supp. 2d 597, 60205 (S.D. Ohio 1999); Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209, 1217 (D. Utah 1997). Persuaded by these decisions from three district courts, we likewise hold the 1916 Act does not require predatory intent as outlined in Brooke Group.

In rejecting a predatory intent element for these types of claims under the 1916 Act, the district court followed the sound reasoning in Geneva Steel. We are similarly convinced. The district court in Geneva Steel confronted the same arguments TKS makes in this appeal. We wholeheartedly adopt the Geneva Steel discussion and resolution of the intent requirement under the 1916 Act. Geneva Steel, 980 F. Supp. at 1212-25. Had Yogi Berra said, "Don't improve something you can't improve," we surely would follow his advice on this issue. Thus, we are content to summarize the salient points made by the district court in Geneva Steel.

The district court in Geneva Steel was asked, as we are today, whether the 1916 Act requires proof of predatory intent, and the defendants in that case essentially argued the 1916 Act requires predatory intent because it "is an antitrust act, not a protectionist act; that is, the [1916] Act is designed to protect competition, not competitors." Id. at 1214. Noting the plaintiff presented "a straightforward argument [that] . . . [t]he 1916 Act . . . means precisely what it says,

nothing more or less," and agreeing "[t]he 1916 Act means what its plain language says," the district court held "the 1916 Act is not limited only to antitrust injury or predatory price discrimination[, but] is also designed to protect United States industry." Id. at 1215. To underscore this holding, the district court declared "there is no need to resort to means of secondary interpretation such as legislative history or reference to other statutes," because "[t]he language of the [1916] Act is remarkably straightforward." Id. at 1216.[6]

The Geneva Steel district court recognized the 1916 Act has "traditional antitrust prohibitions" that "seek to protect competition and are not directed at protecting competitors." Id. at 1215. Specifically, the court noted the 1916 Act's antitrust provisions prohibit dumping done with the intent to "'restrain[] or monopoliz[e] any part of the trade and commerce'" in the subject market. Id. (quoting 15 U.S.C. § 72). The court also recognized the 1916 Act "clearly and literally prohibits non-antitrust and non-predatory pricing conduct," referring to the 1916 Act's prohibition against dumping with the intent to "'destroy[] or injur[e] an industry in the United States.'" Id. at 1215, 1217 (quoting 15 U.S.C. § 72). Thus, the district court relied on the 1916 Act's plain language to hold:

> By the words it chose, Congress protected United States industries from unfair dumping, whether the dumper possessed predatory

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[6] Although the district court declared the clarity of the 1916 Act's plain language precluded further statutory analysis, the district court nonetheless proceeded to conduct such an analysis. See id. at 1216-25.

> intent or not. The intent required is the intent to "injure" a domestic United States industry. When the [1916] Act states that it is unlawful to sell dumped goods with the specific intent to injure a United States industry, it means precisely that. Defendants want to add the limitation that such injury can only occur if predatory pricing is involved, but the [1916] Act simply does not say so.

Id. at 1217.[7] In the end, the court held "the Antidumping Act of 1916 is susceptible of only one clear meaning under the circumstances of the instant case. Plaintiff has adequately plead its case by alleging that the Defendants sold foreign steel in the United States at prices substantially less than the actual market value or wholesale price of such steel products in the countries of production, all with the specific intent to injure the United States Steel Industry." Id. at 1225; see also Wheeling-Pittsburgh Steel, 35 F. Supp. 2d at 603 (rejecting a predatory intent element under the 1916 Act, and holding the plaintiff "must show that the [foreign] defendants sold their product at a price level prohibited by the statute with the intent to injure or destroy [a United States] industry"). We cannot agree more.[8]

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[7] See also id. at 1223 (applauding a law student's analysis of the 1916 Act's plain language as not requiring predatory intent because "it is encouraging to read such commentary that recognizes the plain meaning of the words of the 1916 Act") (quoting Note, Rethinking the 1916 Antidumping Act, 110 Harv. L. Rev. 1555, 155758 (1997)).

[8] For support of its predatory intent argument in this case, TKS relies heavily on decisions rendered during the extensive In re

(continued...)

2. Jury Instructions

TKS argues that, even if predatory intent is not a required element under the 1916 Act, it nevertheless "is entitled to a new trial because the District Court's jury instructions on the intent requirement were fundamentally flawed." For Goss to recover on its antidumping claims against TKS, the district court instructed the jury Goss had to prove the following elements:

> First, that [TKS] commonly and systematically imported or sold, or caused to be imported or sold, newspaper press printing units within the United States at a price substantially less than the actual market value or wholesale price, at the time of exportation to the United States, of comparable printing units in Japan.

(...continued)
Japanese Electronic Products Antitrust Litigation cases of the 1970s and 1980s. See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); In re Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986); In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 319 (3d Cir. 1983); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1190 (E.D. Pa. 1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 402 F. Supp. 251 (E.D. Pa. 1975). We give little weight to TKS's litigation position that these courts required predatory intent as advanced by TKS, as these courts did not specifically address the same issue we address here. However, even if these courts adopted a predatory intent element as advanced by TKS in this litigation, we would reject such an additional element under the 1916 Act for the same reasons the district court in Geneva Steel rejected such arguments. See Geneva Steel, 980 F. Supp. at 1217-20.

> Second, that such acts were done with the intent of injuring or destroying an industry in the United States.
>
> Third, that Goss was injured in its business or property by reason of [TKS]'s conduct.

To clarify the intent requirement, the district court instructed the jury on the meaning of intent under the 1916 Act:

> Intent is defined by the law as that purpose with which a person acts. The phrase "intent of injuring" does not mean an evil desire or a motive of causing harm. To act with an "intent of injuring" means to act with an intent to cause pecuniary loss, rather than simply to win sales and earn profits for oneself. The phrase "intent of destroying" means to act with an intent to put a United States industry out of business.

Part of this instruction finds its genesis in section 6.18.656 of the Eighth Circuit Manual of Model Criminal Jury Instructions, in which "intent to injure" is defined as "to act with intent to cause pecuniary loss."

Before trial, Goss and TKS each submitted proposed instructions defining intent. Goss proposed the following jury instruction: "Intent is defined by the law as that purpose with which a person acts. The phrase 'intent of injuring' does not mean an evil desire or a motive of causing harm. To act with an 'intent of injuring' means to act with an intent to cause pecuniary loss." TKS, on the other hand, proposed the following jury instruction:

> TKS's importation of large newspaper printing presses cannot violate the anti-dumping statute unless TKS imported the units with a specific intent to injure or destroy the large newspaper printing press industry in the United States. "Intent" means that it was the actor's conscious objective to injure or destroy the large newspaper printing press industry.
>
> A foreign seller who is motivated solely by a desire to make a profit for itself does not have a specific intent to injure or destroy a United States industry. The foreign seller's knowledge that its sales will capture business away from its United States competitors does not, standing alone, demonstrate a specific intent to injure the United States industry.

It is apparent the district court blended the parties' proposed instructions to craft the intent instruction.

We review the district court's decision to give its particular instructions for an abuse of discretion. Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 976 (8th. Cir. 2005). When reviewing the instructions given by the district court, "we ask 'whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury.'" Id. at 976-77 (quoting Jones v. Swanson, 341 F.3d 723, 734 (8th Cir. 2003)). As long as the district court correctly instructed the jury on the substantive issues, we allow the district court to exercise its sound discretion in selecting "the actual 'form and language of jury instructions.'" Id. at 977

(quoting Jones, 341 F.3d at 734). We will not reverse a jury verdict based on erroneous instructions unless the errors affected a party's substantial rights. Id. Thus, erroneous jury instructions necessitate a new trial only when we conclude the errors "'misled the jury or had a probable effect on the jury's verdict.'" Burry v. Eustis Plumbing & Heating, Inc., 243 F.3d 432, 434 (8th Cir. 2001) (quoting E.I. du Pont de Nemours & Co. v. Berkley & Co., Inc., 620 F.2d 1247, 1257 (8th Cir. 1980)).

The district court's instruction on intent is the most troubling issue on appeal. TKS's argument that the district court allowed the jury to find TKS violated the 1916 Act simply by trying to win sales for itself is interesting, but ultimately unavailing. To instruct the jury properly on the elements required to prove a dumping claim under the 1916 Act, the district court simply needed to ask the jury whether TKS sold printing press equipment in the United States at dumped prices with the intent to injure or destroy the United States printing press industry. Although the district court made this straightforward task a bit more difficult by giving its intent instruction, we conclude the district court did not abuse its wide discretion in formulating the intent instruction.

The district court properly instructed the jury on the elements of Goss's antidumping claim, and we must remember this fact when cherry-picking one instruction–the intent instruction–out of the district court's entire set of instructions to the jury. Before the jury considered whether TKS acted with the requisite intent, it already had found TKS "commonly and systematically" dumped underpriced goods onto the United States printing press market. Thereafter, the

jury simply was trying to determine whether TKS's dumping was done with the intent to injure or destroy the United States printing press industry. A reasonable jury can understand this requirement without much assistance from the court. In essence, this might be a scenario where lawyers, in their attempt to define a legal principle, might be better off trusting the knowledge and common sense of lay persons.

Regardless, we cannot view the intent instruction in a vacuum filled only with law, unaccompanied by common sense and everyday reason. Rather, we must view the instruction along with the evidence adduced at trial. Here, the evidence showed Goss *was* the United States printing press industry. If a foreign manufacturer of printing press equipment sold printing press additions at dumped prices in the United States with the intent to injure or destroy Goss, then that foreign manufacturer violated the 1916 Act because it acted with the requisite intent to injure or destroy the United States printing press industry. In essence, the jury was asked whether TKS intended to injure or destroy Goss.

The intent instruction correctly focused the jury on the quintessential question of why TKS dumped underpriced products onto the United States printing press market. The district court told the jury TKS must have acted "with an intent to cause pecuniary loss." In the same sentence, the district court explained the requisite intent was something different than TKS's intent "simply to win sales and earn profits for [it]self." The jury was instructed that dumping products onto the United States printing press market was not unlawful if TKS intended to win

sales and earn profits. The district court told the jury such dumping was unlawful only if TKS intended to cause Goss pecuniary loss, i.e., to injure or destroy Goss. TKS could have dumped printing press additions onto the United States market for its own benefit to increase sales and profits, and the 1916 Act would have had nothing to say about it. However, when TKS dumped products onto the United States market to injure–and even destroy–the sole American domestic manufacturer in that industry, the 1916 Act reared its head to prohibit such conduct.

Although the intent instruction is arguably confusing if read by itself, the instruction is clarified when viewed as part of the entire set of instructions and accompanied by the evidence presented at trial. In the end, we are convinced the instructions focused the jury's attention on determining why TKS dumped printing press additions onto the United States market–to sell its products and make profits, or to injure or destroy Goss. And, as discussed below, the jury had more than sufficient evidence to conclude TKS dumped products to injure or destroy Goss, i.e., to cause Goss pecuniary loss.

In addition to concluding the district court did not erroneously instruct the jury, we also conclude any instructional error did not change the outcome of the trial. Viewing the instructions as a whole, the jury was asked whether TKS's dumping practices were intended to injure or destroy Goss, which solely represented the United States printing press industry. This straightforward task was certainly one a reasonable juror could tackle with little assistance from lawyers. Furthermore, the jury's verdict reveals it was

not confused by the district court's instructions, as the jury found for Goss only on three of Goss's six dumping claims. This measured result showed, in part, the jury was not confused by the instructions. We also note TKS presented no evidence or argument that the jury actually was confused by the instruction on intent.

B. Sufficiency of the Evidence

1. Intent to Injure or Destroy United States Industry

As alluded to above, the jury was asked a simple question–did Goss prove TKS dumped printing press additions onto the United States market with the intent to injure or destroy the printing press industry. TKS seems to challenge the jury's finding that Goss succeeded in proving intent. Therefore, we will consider whether sufficient evidence supports that finding.

After the jury found TKS commonly and systematically dumped underpriced printing press additions onto the United States market, the jury was asked whether TKS's dumping was intended to injure or destroy the United States printing press industry. Again, as Goss represented the entire United States printing press industry, the jury had to decide whether TKS intended to injure or destroy Goss. The jury found TKS acted with such an intent. Viewing the evidence in a light most favorable to the jury's verdict and affording all reasonable inferences in Goss's favor, we conclude the evidence supports the jury's finding.

Once the jury found TKS commonly and systematically dumped underpriced printing press additions onto the United States market, the jury was directed to consider why TKS engaged in such behavior, i.e., the jury was asked to consider TKS's intent. In delving into TKS's intent, the jury no doubt looked at TKS's own words and deeds. Several glaring pieces of evidence support the verdict. First, TKS believed Goss was the "enemy," not just a foreign competitor. And TKS was not interested just to compete with Goss–TKS wanted to destroy Goss. As seen in the December 17, 1993, letter, TKS wanted to "win[] completely this survival game." To us, this evidence tends to prove TKS was on a mission to make Goss–the sole domestic printing press manufacturer–extinct. Extinction sounds much like destruction, and is rather strong evidence of TKS's intent to injure or destroy Goss.

Second, TKS was pleased to hear Goss was suffering serious financial difficulties and was in a vulnerable position. After years of dumping millions of dollars of its products onto the United States market, TKS learned Goss was forced to close its main manufacturing plant and lay off its employees. TKS reveled in this news. This evidence also reflects TKS's intent to injure or destroy Goss.

Third, TKSC instructed its United States subsidiary to win a particular order for printing press additions "by all means." Although this evidence strongly supports the dumping element, it, too, supports a finding of intent. The jury reasonably could have concluded TKS intended to do anything to drive Goss out of the United States printing press business.

Fourth, TKS attempted to cover up its dumping practices. Specifically, Goss presented evidence to the jury that TKS (1) knew it faced dumping problems because of its conduct; (2) made secret rebate deals with newspapers to conceal dumping issues; (3) tried to destroy or conceal evidence of its dumping practices; and (4) sought to avoid written agreements when trying to skirt antidumping laws. When this conduct is viewed in light of the evidence listed above, the jury reasonably could have concluded TKS knew it was engaging in unlawful conduct, but nevertheless continued to violate the antidumping laws in its desire to injure or destroy its enemy–Goss.

Although we recognize the 1916 Act differentiates between fierce, foreign competition and destructive dumping done with the requisite intent, we believe the district court properly submitted this dispute to the jury–especially on the intent issue. In the end, the jury heard evidence TKS dumped over $125,000,000 worth of printing press additions onto the United States market in the 1990s. The 1916 Act compelled the jury to consider why TKS chose to offer its products at dumped prices in the United States. The district court's intent instruction asked the jury to decide whether TKS dumped printing press additions onto the United States market in a competitive bid to win sales and earn profits, or whether TKS engaged in dumping with the intent to injure or destroy Goss. The record supports a finding TKS acted with the requisite intent.

2. Price Erosion Theory

Although TKS readily admits Goss's expert witness "provided detailed assertions that TKS's successful sales were at dumped prices," TKS contends Goss presented no evidence to support the jury's verdict on its price erosion claims, i.e., Goss presented no evidence TKS's dumped prices caused Goss's losses on the *Newark Star-Ledger* and *Orlando Sentinel* contracts. Thus, we address whether sufficient evidence supports the jury's finding that TKS's common and systematic dumping of printing press additions with the intent to injure or destroy the United States printing press industry caused Goss to suffer price erosion damages on its sales to the *Newark Star-Ledger* and the *Orlando Sentinel*.

An antidumping claim under the 1916 Act necessarily involves at least two competitors–one foreign and one domestic. The foreign competitor violates the 1916 Act when it dumps underpriced products with the requisite intent, which, in turn, causes the domestic competitor to lower its prices. See Helmac Prods. Corp. v. Roth (Plastics) Corp., 814 F. Supp. 560, 574-75 (E.D. Mich. 1992) (stating "a [domestic] business is injured when it must lower its prices in response to its [foreign] competitor's unfair practices"). Thus, price erosion damages are recoverable in situations where a domestic manufacturer lowers its prices in response to a foreign manufacturer's violation of the 1916 Act. See id. at 575 (holding price suppression damages are recoverable under the 1916 Act even when a domestic manufacturer does not lose sales to a foreign competitor offering dumped prices).

We conclude the record contains sufficient evidence to support the jury's verdict in Goss's favor on its price erosion claims involving the *Newark Star-Ledger* and the *Orlando Sentinel*. According to the evidence adduced at trial, TKS sold over $125,000,000 worth of printing press additions in the United States in the 1990s. Goss's expert witness testified all of these sales were at dumped prices. The evidence further demonstrated Goss was forced to react to this glut of dumped products by lowering its prices. Of course, hindsight is 20/20, and we now know Goss probably lowered its prices too much during the closed bidding process in response to TKS's unlawful dumping practices, i.e., TKS's dumped prices were higher than Goss's sale prices. However, Goss's inability to predict precisely how drastic TKS was cutting its prices (with the intent to injure or destroy Goss) does not afford TKS a sanctuary on appeal, as TKS's unlawful conduct prompted Goss to react. We simply ask whether sufficient evidence supports the jury's finding that TKS's common and systematic dumping with the intent to injure or destroy Goss caused Goss to lower its prices on the *Newark Star-Ledger* and *Orlando Sentinel* sales. It does.

3. Comparable Products

TKS also argues it "is entitled to judgment as a matter of law because Goss did not present sufficient evidence to demonstrate that TKS was selling 'articles within the United States at a price substantially less than the actual market value or wholesale price of *such* articles' in Japan." (citing 15 U.S.C. § 72) (emphasis added). The Third Circuit Court of Appeals has

recognized the 1916 Act requires "proof that a price differential exists between two comparable products, one of which is imported or sold in the United States and the other of which is sold in the exporting country." In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 319, 324 (3d Cir. 1983). However, the Third Circuit also held "the 1916 Act does not require a comparison only between identical products." Id. at 325.

The parties did not dispute this standard, and the district court also agreed, as seen by its instruction to the jury that Goss had to prove TKS "commonly and systematically imported or sold, or caused to be imported or sold, newspaper press printing units within the United States at a price substantially less than the actual market value or wholesale price, at the time of exportation to the United States, of comparable printing units in Japan." The district court then defined "comparable":

> the technological differences between products should be compared in terms of customer use and preference and marketability. Products do not need to be identical to be comparable. To be comparable, products must be more than functional equivalents or in the same generic category. The comparison also must take into account the technological significance of any difference between the products and the differences in production costs caused by such differences. That products sold in Japan may have technical components that make them work in Japan while products sold in the United States have technical components that make them

> work in the United States does not make the products noncomparable.

TKS does not contend these instructions are wrong. Instead, TKS simply asserts sufficient evidence does not support the jury's findings that the products at issue were comparable.

Goss presented evidence that TKS's dumped products in the United States were "essentially the same" as the products TKS sold in Japan. One Goss witness testified "the TKS additions sold in Japan and the USA are directly comparable in terms of technology, construction, basic design, and value." According to testimony heard by the jury, a common printing press addition TKS sold in the United States "is absolutely identical between the–those units that are shipped in the US and those units that are shipped to Japan." Goss's expert witness also compared the printing press additions TKS sold in the United States with the equipment TKS sold in Japan, and concluded the equipment was comparable. Finally, the evidence further showed TKS itself realized it had dumping concerns, especially involving the sales to *The Dallas Morning News* and to the *Newark Star-Ledger*. All of this evidence required the district court to submit the comparability question to the jury, and the jury found the printing press additions TKS sold to *The Dallas Morning News*, the *Newark Star-Ledger* and the *Orlando Sentinel* were comparable to the equipment TKS sold in Japan. We will not disturb the jury's verdict.

C. Reputation Evidence

TKS contends it "is entitled to a new trial because the District Court erred in ruling that evidence of Goss's poor reputation and poor financial situation should be excluded as irrelevant under Federal Rules of Evidence 401 and 402." Specifically, TKS sought to present evidence to the jury concerning "Goss's poor reputation in the newspaper community." TKS's argument on appeal stresses Goss lowered its prices, not in response to TKS's unlawful dumping, but in response to Goss's poor reputation in the newspaper industry.

At trial, the district court specifically questioned TKS's attorneys about the evidence relating to the sales at issue to determine the relevancy of TKS's reputation evidence:

THE COURT: There are twelve specific sales that are at issue here. Is there going to be evidence from any of these customers of TKS that they made their decision to buy a TKS product in part because of the reputation that Goss had for not taking care of its customers in the mid 1990s to late 1990s?

[TKS ATT'YS]: Mr. Sheehan from the Dow Jones will testify that the 1998 Dow Jones purchase – among the things he was aware of during the negotiation with Goss was disastrous installations it had with the same kind of unit with other newspapers.

. . . .

THE COURT: I don't see how any of this is relevant, except documents that may come in through [the single newspaper] that relate specifically to what they knew or what they were thinking at the time they decided to buy the TKS product over the Goss product. But otherwise, none of the rest of this [generalized reputation evidence] is going to come in because it's not relevant.

We review the district court's evidentiary rulings for an abuse of discretion, but never lose sight that "[a]n allegedly erroneous evidentiary ruling does not warrant a new trial unless the evidence was so prejudicial that a new trial would likely produce a different result." Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 833 (8th Cir. 2005) (citations and quotations omitted).

TKS has sharpened its argument on appeal, but it does not convince us we must reverse the district court's evidentiary decisions and grant a new trial. Like the district court, we do not believe TKS laid any foundation to show Goss's generalized reputation in the newspaper industry was relevant to why the newspapers at issue in this case purchased printing press additions from either TKS or Goss. Furthermore, TKS did not present evidence to show Goss lowered its prices on the sales at issue to fend off its poor reputation in the newspaper industry. Mere speculation could not suffice. The bottom line is the

district court did not abuse its considerable discretion in deciding generalized reputation evidence would serve no purpose other than to divert the jury's attention away from the relevant evidence and issues.[9]

D. Statute of Limitations[10]

TKS's final argument is the district court misapplied the four-year statute of limitations to Goss's allegations that TKS violated the 1916 Act when it sold printing press additions to *The Dallas Morning News*, contending Goss's claims relating to TKS's sales of printing press additions to *The Dallas Morning News* were time-barred. Specifically, TKS maintains "the limitations period [on this claim] commenced in 1994 because the agreement to deliver two color tower additions in 1996 arose from an obligation established in the contract executed by TKS and [*The Dallas Morning News*] in 1994." TKS further argues that, "[a]lthough [*The Dallas Morning News*] and TKS renegotiated the contract in 1996, the terms of the agreement remained effectively unchanged from those established in 1994."

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[9] We also note the district court allowed TKS to present evidence to the jury that Goss had customer service issues with some newspapers. The district court also allowed TKS to ask a newspaper representative how Goss's reputation impacted sales to that newspaper. Thus, when TKS offered relevant evidence on Goss's reputation–as opposed to generalized evidence employing speculation–the district court correctly ruled it admissible.

[10] The 1916 Act does not contain a limitations period. The district court addressed this issue and determined, based on similarities between the 1916 Act and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 15, a four-year statute of limitations applied. The parties do not challenge this determination.

We conclude the district court did not misapply the four-year statute of limitations by allowing Goss to present evidence and recover damages on TKS's 1996 renegotiated contract with *The Dallas Morning News*. The evidence showed that, after TKS was faced with dumping violations arising out of its 1994 contract with *The Dallas Morning News*, TKS sought to renegotiate the contract. In 1996, TKS and *The Dallas Morning News* renegotiated the terms of the 1994 contract to avoid a sale of printing press additions at dumped prices. The evidence showed TKS induced *The Dallas Morning News* to renegotiate the 1994 contract by offering a secret rebate so *The Dallas Morning News* still would end up receiving the dumped price. This manipulative conduct to sell the additions at dumped prices, which occurred in 1996, violated the 1916 Act, and was clearly within the statute of limitations. To be blunt, TKS's renegotiated contract with *The Dallas Morning News* in 1996 was as much a violation of the 1916 Act as was the 1994 contract.[11]

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[11] Alternatively, we conclude TKS waived its statute of limitations argument during the following exchange at trial:

THE COURT: Which sales, then, did you call–did you determine–or do you argue within the statutory period?

[GOSS ATT'Y]: It would be the Dallas Morning News 1996 . . .

. . . .

THE COURT: Does the Defense agree that the statute of limitations is appropriately applied, as indicated by the Plaintiff, to [The] Dallas Morning

(continued...)

III. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment in Goss's favor.

SMITH, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's view that the weight of persuasive precedent holds that Goss need not plead or prove specific predatory intent to prevail under the Antidumping Act of 1916. However, I disagree regarding the adequacy of the district court's jury instruction on intent. Competition is the very hallmark of American free enterprise. Limitations upon it should not be lightly imposed or enforced. As noted by *Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 F. Supp. 1209, 1224 (D. Utah 1997), while the 1916 Act clearly protects competitors as well as competition, it neither

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(...continued)

News [sale in 1996]. . . ?

[TKS ATT'YS]: . . . I believe so, Your Honor. . . . That's correct.
THE COURT: So there's really no disagreement between you on the damages? . . . Which sales or -

[TKS ATT'YS]: That's correct.

Furthermore, in a pretrial submission to the district court, TKS wrote, "Following a lengthy and convoluted negotiation between TKS and [*The Dallas Morning News*] during 1996, the parties agreed to rescind the option clause of the 1994 contract, and to enter into a new contract for two towers."

criminalizes nor prohibits normal competition or capitalism. TKS is certainly entitled to place its products into the American press market, as long as it does not do so with the prohibited intent to injure or destroy the United States press industry. Intent to injure under the 1916 Act requires more than an intent to cause pecuniary loss.

We review the district court's jury instructions for abuse of discretion "looking to the instructions as a whole to determine whether they fairly submitted the issues to the jury." *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005). In instructing the jury on intent in this case, the district court stated:

> Intent is defined by the law as that purpose with which a person acts. The phrase "intent of injuring" does not mean an evil desire or a motive of causing harm. To act with an "intent of injuring" means to act with an intent to cause pecuniary loss, rather than simply to win sales and earn profits for oneself. The phrase "intent of destroying" means to act with an intent to put a United States industry out of business.

The district court erred in instructing the jury that "intent of injuring" only requires proof of an "intent to cause pecuniary loss." TKS maintains that a party cannot intend to win sales for itself without also intending to cause pecuniary loss to its competitors. Within the unique facts of this case, I believe they are correct. In a very limited, specialized market such as the press industry, winning a sale from a competitor,

even by legitimate efforts, would likely result in "pecuniary loss" to another seller. Something more than reduced sales must be shown to justify the imposition of treble damages under the Act.

Therefore, because the district court erred in its instruction that "intent of injuring" means "intent to cause pecuniary loss," a new trial should be granted.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

GOSS INTERNATIONAL CORP.,
a Delaware corporation,
Plaintiff,

December 4, 2003

v.

NO. COO-35-LRR

Hon. Linda R. Reade

TOKYO KIKAI SEISAKUSHO, LTD.,
a Japanese corporation; and TKS
(U.S.A.), INC.,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Linda R. Reade, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

Judgment is hereby entered in favor of plaintiff Goss International Corporation and against defendants Tokyo Kikai Seisakusho, Ltd. and TKS (U.S.A.), Inc., in the amount, after trebling, of $31,619,847.00, with interest thereon at the rate provided in 28 U.S.C. § 1961, and plaintiff's costs of action.

There being no just reason for delay, this is a final and appealable order. This Court retains jurisdiction to adjudicate plaintiffs bill of costs and petition for attorneys' fees.

ENTER:

s/Linda R. Reade

Judge, US District Court

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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No. 07-618

FILED

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IN THE

Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. AND TKS (USA), INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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January 9, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether a U.S. court may enjoin a foreign action after satisfaction of the judgment entered by the U.S. court when the foreign action does not involve a relitigation of the issues or causes of action in the domestic lawsuit and has been brought under a law enacted by a foreign sovereign to vindicate its rights established by the World Trade Organization.

2. Whether the Eighth Circuit's treatment of international comity as applied to an antisuit injunction merits review when, as an independent basis for its decision, the court found that the prerequisites for a foreign antisuit injunction were plainly not satisfied.

STATEMENT PURSUANT TO RULE 29.6

The petition properly identifies the parties to this proceeding. Pursuant to Rule 29.6 of the Rules of this Court:

Respondent Tokyo Kikai Seisakusho, Ltd. does not have any parent corporation, and no publicly held corporation owns 10 percent or more of Tokyo Kikai Seisakusho, Ltd.'s stock.

Respondent TKS (U.S.A.), Inc. is 100% owned by Tokyo Kikai Seisakusho, Ltd. and is not a publicly held corporation or other publicly held entity.

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INTRODUCTION

Respondents Tokyo Kikai Seisakusho, Ltd. and TKS (USA), Inc. ("TKS") respectfully submit this brief in opposition to the Petition for a Writ of Certiorari (the "petition") filed by petitioner Goss International Corp. ("Goss"). The petition should be denied.

Petitioner seeks review of a decision of the Eighth Circuit reversing the district court's grant of a foreign antisuit injunction that prevented a Japanese company from commencing an action in Japanese court, against a Japanese affiliate of Goss's, and under a Japanese law that creates an entirely different cause of action and requires proof of facts totally distinct from those at issue in the domestic lawsuit.

The Eighth Circuit opinion does not present the questions, or the conflicts with other decisions, that petitioner alleges. Rather, the Eighth Circuit's decision is a straightforward application of settled law to a unique set of facts and has exceedingly limited application to other cases.

There is no merit to petitioner's principal claim that the Eighth Circuit's decision conflicts with the Second Circuit's ruling in *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007). Both circuit panels relied upon meaningfully similar tests to determine whether a foreign antisuit injunction could appropriately issue – namely, whether the foreign action as to which the antisuit injunction is sought would relitigate issues addressed in the domestic action. Addressing quite different facts, the two circuits unremarkably arrived at different

conclusions. Indeed, the Second Circuit decision – issued after the Eighth Circuit's decision – expressly acknowledged that the different facts involved in the two cases explained why the two circuits resolved them differently. What petitioner describes as a circuit "split" is merely two circuits engaging in highly fact-bound applications of consistent legal principles.

In addition, petitioner errs in asserting that the Eighth Circuit decision would enable this Court to address the circuits' divergent approaches regarding the weight to give to international comity in the context of foreign antisuit injunctions. The Eighth Circuit found that petitioner's motion for an antisuit injunction failed on the preliminary ground that the foreign action is not a relitigation of the domestic action. Thus, the court had no cause to discuss comity issues except as general dicta. And, to the extent international comity may be relevant, it strongly supports the outcome in this case under any of the applicable standards. This case thus provides the Court with no meaningful opportunity to address any perceived divergences among the circuits on this comity issue.

While petitioner does not even suggest that the Eighth Circuit decision conflicts with decisions of this Court, certain *amici* argue that the Eighth Circuit decision departs from broad jurisdictional principles endorsed by the Court. In fact, the broad questions presented by the *amici* briefs are neither raised here nor addressed by the Eighth Circuit in deciding this fact-bound case. To the contrary, the Eighth Circuit's decision is fully consistent with the jurisdictional holdings of this Court and of the courts of appeals. This is, at base, a unique case involving a repealed U.S. statute, lengthy WTO proceedings, and a

Japanese law that is applicable *only* to the Japanese affiliates of the parties now before this Court. Certiorari should be denied.

COUNTER-STATEMENT OF THE FACTS

1. In 2000, petitioner brought suit against TKS (and other parties) under the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004) (the "1916 Act"). The Act prohibited foreign exporters from "dumping" – *i.e.*, selling merchandise in the United States at prices substantially below those at which they sell such products in their home countries, provided they do so with certain prohibited intent. The 1916 Act provided for a private cause of action for domestic parties injured by such imports, and authorized the automatic trebling of damages plus attorney's fees. Only one final judgment was entered against a defendant under the Act during its nearly 90-year history – the judgment against TKS in favor of Goss in 2003. *Goss Int'l Corp.* v. *Man Roland Druckmaschinen Aktiengesellschaft (Goss I)*, 434 F.3d 1081, 1083-84 (8th Cir.), *cert denied*, 126 S. Ct. 2363 (2006).

2. In the late 1990s, the European Communities ("EC") and Japan separately requested that the World Trade Organization ("WTO") establish a dispute settlement panel to determine whether the 1916 Act was inconsistent with the WTO Anti-Dumping Agreement. Pet. App. 5a n.3.[1] In 2000 both

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[1] In 1994, Congress approved the WTO Agreement. 19 U.S.C. § 3501 *et seq.* The WTO Agreement incorporates the most recent version of the General Agreement on Tariffs and Trade (the "GATT 1994") and its ancillary agreements, including the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "WTO Anti-Dumping Agreement").

WTO panels found that the 1916 Act violated the GATT 1994 and the Anti-Dumping Agreement. *Id.* The panel handling Japan's complaint concluded that "since violations have been established that have not been rebutted by the United States, the United States nullifies or impairs benefits accruing to Japan under the WTO Agreement" and suggested that "one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act." Complaint by Japan, Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS162/R, ¶¶ 6.289(g), 6.292, at 204, 205 (May 29, 2000).

The United States appealed both decisions to the WTO Appellate Body, which sustained the panels' rulings. Thereafter, in September 2000, the Dispute Settlement Body ("DSB") adopted the panel and the Appellate Body reports and formally requested that the United States bring the 1916 Act into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement. Pet. App. 5a n.3. The United States then informed the DSB that it would implement the DSB's rulings and recommendations by repealing the 1916 Act. *Id.*

In January 2002 the United States still had not repealed the 1916 Act so the EC and Japan sought authorization from the WTO to suspend concessions granted to the United States, and the matter was referred to arbitration. Pet App. 6a n.3. The United States, however, requested that the arbitration be suspended because "a proposal to repeal the 1916 Act and to terminate cases pending under the Act was being examined by the U.S. Congress." World Trade Org., *United States – Anti-Dumping Act of 1916, Summary of the Dispute to Date* (August 20, 2007), *available at* http://www.wto.org/English/tratop_e/

dispu_e/cases_e/ds136_e.htm. Based in part on this representation, Japan and the EC agreed to suspend temporarily the arbitration with the right to resume the proceedings if no substantial progress was made by June 2002. *Id.* In September 2003, because of the United States' continued failure to repeal the 1916 Act, the EC reactivated the arbitral proceedings. See Minutes of DSB Meeting of October 2, 2003, WT/DSB/M/156, at 2 (Nov. 10, 2003); Minutes of DSB Meeting of November 7, 2003, WT/DSB/M/157, at 3 (Dec. 18, 2003).

On February 24, 2004, the arbitrators in the EC's dispute concluded that the measure of "nullification or impairment of benefits" should specifically include "any final judgments entered against EC companies or their subsidiaries under the 1916 Act . . . up to the cumulative dollar or monetary value of the final judgments." Recourse to Arbitration, Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916*, WT/DS136/ARB, ¶ 5.58, at 23 (Feb. 24, 2004). The ruling also determined that future judgments and settlements were to be included in the calculation of "nullification or impairment," and "[w]hat would be relevant for the purpose of this calculation would be the total monetary value of such judgments under the 1916 Act . . . which could be matched by the suspension of obligations by the European Communities of an equivalent monetary amount." *Id.* ¶ 6.6, at 27.

3. Congress repealed the 1916 Act in December 2004. The legislative history acknowledged that the repeal was undertaken to comply with the United States' obligations under the WTO Agreement. H.R. Rep. No. 108-415, at 2 (2004). Likewise, the House Report indicated that the 1916 Act was obsolete and not necessary to protect the United States from

dumping of foreign products into the U.S. market. See *id* at 3. Congress, however, repealed the 1916 Act prospectively, thus leaving the litigation then pending between petitioner and TKS in the Northern District of Iowa unaffected. Consequently, Congress reneged on the repeated promises made by the Executive Branch to the DSB and our WTO partners that the repeal of the 1916 Act would expressly "provide that no judgments pursuant to actions under such Act shall be entered on or after 26 September 2000" – the latter being the date of the DSB's adoption of the panel and Appellate Body reports. See Minutes of DSB Meeting of March 8, 2002, WT/DSB/M/121, at 2 (Apr. 3, 2002).

4. In light of the United States' failure, despite its assurances, to repeal the 1916 Act retrospectively, Japan enacted legislation on December 8, 2004, "to protect the persons who incurred losses pursuant to [the 1916 Act], and thus contribute to the healthy development of the nation's economy." Special Measures Law, Law No. 162 of 2004, art. 1. The Special Measures Law authorizes Japanese companies, such as TKS, which are compelled to pay damages under the 1916 Act, to seek indemnification in Japanese courts from any Japanese affiliate of the U.S. company that obtained such damages.

5. On June 15, 2006, the district court issued an Order granting petitioner's motion for a preliminary injunction preventing TKS from asserting or pursuing its rights in Japan under the Special Measures Law. The court concluded that all four factors set forth by the Eighth Circuit in *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc), weighed in favor of the issuance of a preliminary injunction. Pet. App. 83a.

The Eighth Circuit unanimously reversed. Beginning its discussion with a review of the standards applied by various courts of appeals when addressing comity issues in the context of foreign antisuit injunctions, the court of appeals noted broadly that the courts of appeals come within one of two camps: "conservative" circuits which tend to be more deferential to comity considerations and "liberal" circuits that tend to be less deferential. Pet. App. 9a-11a. Should a court need to balance comity considerations when reviewing a foreign antisuit injunction, the Eighth Circuit decided to side with those "conservative" circuits that are more respectful of foreign interests. *Id.* at 11a.

The Eighth Circuit next noted that parallel proceedings in a domestic and foreign court should generally be allowed to proceed simultaneously "'at least until a judgment is reached in one action'" which can be pled as res judicata in the other. Pet. App. 22a (quoting *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984)). The court further concluded that only after this threshold point is reached, can a court consider other factors, such as "protecting United States jurisdiction, preserving important United States public policies, and balancing domestic interests with the principles of international comity." *Id.* at 17a (citing *Laker Airways*, 731 F.2d at 926-45).

Based on this framework, the Eighth Circuit determined that a foreign antisuit injunction prohibiting TKS from pursuing its rights under the Japanese Special Measures Law was inappropriate. It reasoned that "the United States courts are being asked to prevent TKS from seeking a remedy available solely in Japan," which is "entirely new and original" and "of a different kind or . . . principle than

that of the prior decree." Pet. App. 22a (internal quotation marks omitted). It thus held that the foreign action was not a relitigation of the domestic action. Because no relitigation was at issue, no justification remained for the district court to assert that its jurisdiction over the prior U.S. action vested it with authority to enjoin proceedings wholly under Japanese law. *Id.* at 28a-29a.

Although this jurisdictional ruling was dispositive, the court of appeals also addressed the district court's treatment of international comity concerns. Noting Japan's strong interest in the Special Measures Law, the Eighth Circuit held that the "United States Executive and Legislative Branches, not the Judiciary," are the appropriate governmental branches to address any diplomatic issues arising from the Japanese law. Pet. App. 27a. Accordingly, the court of appeals concluded that "the jurisdictional circumstances *and* comity considerations . . . . under the facts of this case, [lead to the determination that] the maintenance of the antisuit injunction on a satisfied judgment cannot be justified." *Id.* at 28a-29a (emphasis added).

REASONS FOR DENYING THE PETITION

The unremarkable decision of the Eighth Circuit does not warrant this Court's review. Petitioner's assertion that there is a conflict between the Eighth and Second Circuits ignores the basic point that both circuits simply reached different conclusions as they applied similar standards to vastly different facts. Similarly, petitioner's claim that the lower court deepened divergence among the circuits on the question of deference to international comity in the context of foreign antisuit injunctions is fatally undermined by the Eighth Circuit's threshold

determination that petitioner's foreign antisuit injunction motion failed, apart from and *before* the court addressed comity considerations. The vacatur of the injunction and dismissal of this action were entirely consistent with this Court's precedents. The Eighth Circuit applied well-settled principles to a unique situation in which all the relevant laws are either repealed or have no effect beyond the parties to this case.

I. NO CONFLICT EXISTS BETWEEN THE DECISIONS OF THE EIGHTH CIRCUIT AND THE SECOND CIRCUIT.

Petitioner initially seeks to have this Court review what it describes – wrongly – as a "direct conflict" between the Eighth Circuit's decision and the Second Circuit's decision in *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007). Pet. at 16. Petitioner asserts that the "Second Circuit specifically rejected the Eighth Circuit's holding and rationale in this case." *Id.* at 17. These assertions are, however, demonstrably incorrect.

Ignoring the plain language of the opinions, petitioner asserts that *Goss* and *Karaha Bodas Co.* make sweeping holdings on the question whether a federal court possesses jurisdiction to enjoin a defendant from pursuing litigation in a foreign court after the defendant has satisfied the court's adverse judgment. Pet. at 16-19. Neither case does so. Rather, in both cases, the touchstone inquiry is whether the foreign action was a relitigation of the domestic action. The Second Circuit held that the foreign action was a relitigation of the issues that had already been presented and resolved in the domestic proceeding and, consequently, the federal court had ancillary jurisdiction to issue the antisuit injunction.

Karaha Bodas Co., 500 F.3d at 121-23. The Eighth Circuit, by contrast, recognized that there would be no relitigation in this case. Any foreign action under Japan's Special Measures Law could proceed only on the basis that a valid U.S. judgment had been rendered against TKS. So long as that judgment could be challenged, proceedings could not be commenced in Japan pursuant to the Special Measures Law. Accordingly, in the absence of any relitigation of issues underlying the domestic suit, the district court had no basis upon which to assert that its jurisdiction continued once the judgment had been satisfied. Pet. App. 20a-23a. In other words, although the Eighth Circuit and Second Circuit reviewed very different sets of fact, their analyses are fully consistent.

Specifically, in *Karaha Bodas Co.*, the Karaha Bodas Company ("KBC") received a large award arising out of a Swiss arbitral proceeding stemming from a joint development deal with Pertamina, an Indonesian oil and gas company. Pertamina refused to pay this award and KBC initiated confirmation and enforcement proceedings in federal courts in the Southern District of Texas and Southern District of New York. Both courts agreed that the arbitral award should be enforced and were respectively affirmed by the Fifth and Second Circuits. Pertamina satisfied the judgment but then immediately brought a lawsuit against KBC in the Cayman Islands arguing that the arbitration award had been won by fraudulent means. KBC then sought and was granted an antisuit injunction by the Southern District of New York.

The Second Circuit affirmed, holding that even after satisfaction of the judgment "federal courts have continuing jurisdiction . . . to enjoin a party properly

before them from *relitigating* issues in a non-federal forum that were *already decided* in federal court." 500 F.3d at 129 (emphasis added). In other words, a district court may issue a foreign antisuit injunction post satisfaction of the judgment when ""a prior court has reached a judgment on the *same* issues."" *Id.* at 120 (emphasis added) (quoting *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004) (quoting *Laker Airways*, 731 F.2d at 928 n.53)).

Goss, on the other hand, does *not* raise a relitigation issue. The domestic lawsuit concerned whether TKS violated the 1916 Act by importing or selling large newspaper printing presses ("LNPPs") from Japan in the United States at prices substantially less than the actual market value or wholesale prices of such presses in Japan with the intent of destroying or injuring the U.S. LNPP industry. See 15 U.S.C. § 72 (repealed 2004). In contrast, the Special Measures Law authorizes companies, such as TKS, which are compelled to pay damages under the 1916 Act, to seek indemnification in Japanese courts from any Japanese affiliate of the U.S. company that obtained such damages. Findings of liability and satisfaction of that judgment are a prerequisite to commencing an action under the Special Measures Law, and a Japanese court has no authority to reconsider the issues decided in a lawsuit under the 1916 Act or to conclude that TKS did not violate that Act.

Accordingly, the court below found:

> The issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction. TKS now seeks to litigate in Japan a cause of action solely available in Japan and not previously

> litigated in the antidumping litigation. The issues are not the same simply because TKS's cause of action under the Special Measures Law rests on the imposition of an adverse judgment against TKS under the 1916 Act.

Pet. App. 23a.[2]

Far from "expressly reject[ing]" the *Goss* decision, Pet. at 13, the Second Circuit recognized that its determination that a particular judgment was being relitigated distinguished its case from *Goss*. Indeed, the court sought to forestall any claims based on an asserted inconsistency with *Goss* by emphasizing the lack of a conflict between the two courts: "*[m]oreover* as *Goss* suggests, a federal court may in some circumstances (*not presented here*) have a diminished need for an anti-suit injunction to protect a judgment once ancillary proceedings to satisfy the judgment have run their course." *Karaha Bodas Co.*, 500 F.3d at 129 n.20 (emphasis added). *Goss*, too, is inconsistent with petitioner's broad premise. There the court of appeals stated, "we reach no categorical conclusion regarding the propriety of the issuance of an anti-suit injunction in all cases involving the preservation of a judgment." Pet. App. 29a n.9. No disagreement exists here; to the contrary, the decisions reinforce one another.

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[2] The Eighth Circuit noted that "the doctrine of res judicata should apply as a defense to further litigation of the *same* issues." Pet. App. 22a (emphasis added). Because, by commencing an action under the Special Measures Law, TKS would not be relitigating the issues involved in the litigation of the 1916 Act, it would not be challenging the res judicata effect of the U.S. court's judgment.

II. THIS CASE PROVIDES NO OPPORTUNITY FOR THIS COURT TO ADDRESS PERCEIVED DIVERGENCES AMONG THE CIRCUITS REGARDING THE TREATMENT OF INTERNATIONAL COMITY.

Petitioner points to an inter-circuit divergence over the treatment of international comity when considering a foreign antisuit injunction, Pet. at 19, but this case presents an exceptionally poor vehicle for addressing that issue. The Eighth Circuit independently recognized petitioner's failure to meet the prerequisites that would justify any consideration of international comity. Moreover, an antisuit injunction in this case would offend principles of international comity under any applicable standard.

A. All Courts Of Appeals Concur That Only Foreign Litigation Of The Same Issues Is A Suitable Subject For A Foreign Antisuit Injunction.

At the outset, petitioner's claim that this case would be a good vehicle to address the inter-circuit divergence over the treatment of international comity fails because the Eighth Circuit rejected the antisuit injunction on the threshold basis that any Japanese action would not be a relitigation of the U.S. domestic action. The court observed that once one court reaches final judgment, "the doctrine of res judicata should apply as a defense to further litigation of the same issues." Pet. App. 22a (citing *Laker Airways*, 731 F.2d at 939).

Indeed, the Eighth Circuit's approach is consistent with that of *every* court of appeals that has considered the prerequisites for a foreign antisuit injunction – namely, the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits.

In *Laker Airways*, the D.C. Circuit set the pattern by recognizing that a court may protect its jurisdiction from relitigation of the same issues. 731 F.2d 909, 927-28 (D.C. Cir. 1984). The court was concerned with protecting the res judicata effect of its judgment, not with whether a party may commence an action in a foreign jurisdiction under foreign law that has different elements from those involved in the domestic action. Indeed, *Laker Airways* explicitly endorsed the right of a foreign defendant to seek relief against a U.S. plaintiff in the courts of the defendant's country. *Id.*

Other circuit courts have similarly focused on whether the foreign and domestic suits present identical or overlapping issues. See *Quaak* v. *Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) ("The gatekeeping inquiry is, of course, whether parallel suits involve the *same* parties and issues. Unless that condition is met, a court ordinarily should go no further and refuse the issuance of an international antisuit injunction.") (emphasis added); *Paramedics Electromedicina Comercial, Ltda* v. *GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004) ("An anti-suit injunction against parallel litigation may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined."); *Gen. Elec. Co.* v. *Deutz AG*, 270 F.3d 144, 158 (3d Cir. 2001) (finding that foreign antisuit injunction may be granted to sustain res judicata effect, which requires "a final judgment on the merits in a prior suit involving the same parties or their privies, and a subsequent suit based on the *same* cause of action") (emphasis added); *Kaepa, Inc.* v. *Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996)

(holding that the district court did not abuse its discretion in issuing foreign antisuit injunction when party alleged "mirror image claims" in foreign jurisdiction); *Gau Shan Co.* v. *Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir. 1992) ("'[P]arallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, *at least until a judgment is reached in one [jurisdiction] which can be pled as res judicata in the other*.'") (second alteration in original) (second emphasis added) (quoting *Laker Airways*, 731 F.2d at 926-27); *Allendale Mut. Ins. Co.* v. *Bull Data Sys., Inc.*, 10 F.3d 425, 433 (7th Cir. 1993) (considering that the "inability to plead res judicata might deprive [the plaintiff] of the benefit of its judgment," affirmed the district court's issuance of an antisuit injunction which involved simultaneous actions concerning the same liability); *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) ("In applying this test, we believe the first step in determining whether an anti-suit injunction is appropriate is to determine whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined." (internal quotation marks omitted)); *Canon Latin Am., Inc.* v. *Lantech (CR), S.A*, 508 F.3d 597, 601 (11th Cir. 2007) (per curiam) ("As an initial matter, a district court may issue an anti-suit injunction only if: (1) the parties are the same in both the foreign and domestic lawsuits, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined.") (internal quotations and alteration omitted).[3]

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[3] Further belying petitioner's claim of a split with the Second Circuit is *Karaha Bodas Co.*'s reiteration of this same principle: "[A]n anti-suit injunction against foreign litigation may be

Because courts only consider comity concerns after these threshold requirements are met, petitioner's assertion of the inter-circuit split on this issue is irrelevant to the proper disposition of this case. Pet. App. 22a (noting that when relitigation is not at issue, "the role of comity for antisuit injunction purposes essentially is moot"); see, *e.g.*, *Canon Latin Am.*, 508 F.3d at 601 ("Once these threshold requirements are satisfied, courts must then consider additional factors to determine whether an injunction is appropriate."); *Quaak*, 361 F.3d at 18 (stating that "[i]f – and only – if' threshold requirements are met should the court analyze international comity considerations); *Paramedics*, 369 F.3d at 652 ("Once past this threshold [for an anti-suit injunction], courts are directed to consider a number of additional factors, including whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum."); *E. & J. Gallo Winery*, 446 F.3d at 991 (reaching comity considerations after determining that the threshold requirements were met).[4]

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imposed only if two threshold requirements are met: '(A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined.'" 500 F.3d at 119 (quoting *Paramedics*, 369 F.3d at 652).

[4] Nor do any of the cases cited by petitioner support a contrary conclusion. For example, in *Commercializadora Portimex S.A. de CV* v. *Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645 (E.D. La. 2005), the district court permanently enjoined the plaintiff from bringing suit in Mexico because: (1) it would be an inequitable hardship for the defendant to litigate the *same* claims again in a foreign jurisdiction; (2) it would be "clearly inefficient to permit parties to thwart the finality of judgments by relitigating the *same* claims once they have been fully adjudicated"; and (3) "the litigation in Mexico is *duplicative* of

B. Under Any Circuit's Comity Standard, Issuance Of A Foreign Antisuit Injunction Would Be Inappropriate On These Facts.

Even if this case did involve foreign court relitigation of domestically-resolved issues, this case would be a poor vehicle to address divergent approaches to the treatment of international comity, because those considerations weigh heavily against granting a foreign antisuit injunction under any standard. "Under either the conservative or liberal approach, '[w]hen a preliminary injunction takes the form of a foreign anti-suit injunction, [courts] are required to balance domestic judicial interests against concerns of international comity.'" Pet. App. 10a (alterations in original) (quoting *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003)).

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the litigation that took place before [the district court]." *Id.* at 649-50 (emphasis added). Similarly, in *Silva Run Worldwide Ltd.* v. *Gaming Lottery Corp.*, 53 F. App'x 597 (2d Cir. 2002), the Second Circuit affirmed the district court's decision to enjoin the former president of an internet gaming operation from pursuing an incipient lawsuit for attorney malpractice brought in Canada against his and the company's former counsel. *Id.* at 597-98. The district court previously had resolved an ancillary dispute between the former president, the company, and their counsel, which included allegations of attorney malpractice that had been raised but not pursued. *Id.* at 598. In the second lawsuit, the district court issued an antisuit injunction to avoid "vexatious relitigation" of matters that were or could have been raised in the first U.S. action. *Silva Run Worldwide Ltd.* v. *Gaming Lottery Corp.*, Nos. 96 Civ. 3231(RPP), 96 Civ. 5567(RPP), 2002 WL 975623, at *9-10 (S.D.N.Y. May 9, 2002). None of these cases, or any other case cited by Goss, indicates that a U.S. court may seek to prevent a foreign national, such as TKS, from having recourse to its own courts for relief under a foreign statute that does not involve issues that have been resolved by U.S. courts.

The Special Measures Law reflects a wholly legitimate act by the Government of Japan to protect its nationals from a continuing violation by the United States of its international obligations. Japan enacted the Special Measures Law following extensive proceedings in the WTO and the failure of the United States fully to comply with the WTO rulings. The 1916 Act was found by two WTO panels to violate the WTO Agreement. Pet App. 5a n.3. The panel handling Japan's complaint suggested that "one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act." Complaint by Japan, Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS162/R, *supra*, ¶ 6.292, at 205. Despite repeated assurances by the United States to Japan and other Members of the WTO to the contrary, Congress only prospectively repealed the 1916 Act. See Communication from the Arbitrator, WT/DS162/21 (Mar. 4, 2002). The legislative history accompanying the 1916 Act's repeal suggests that Japan enacted the Special Measures Law because the Japanese Diet considered it a necessary response to the United States' continuing violation of its international obligations. See H.R. Rep. No. 108-415, at 5.

In addition, petitioner's argument incorrectly assumes that an action in Japan directly undermines the federal courts' jurisdiction and the particular judgment here. Pet. at 16. As discussed above, an action under the Special Measures Law is predicated upon, and does not relitigate, the validity of the U.S. judgment. Instead, the Special Measures Law allows Japan to assert its rights under international law pursuant to the WTO's repeated findings that the 1916 Act was inconsistent with the United States' obligations under the WTO Agreement.

The Government of Japan did not pass the Special Measures Law simply because it disapproved of the 1916 Act or found the treble damages remedy offensive. Japan passed the Special Measures Law only after the WTO had determined that the 1916 Act was inconsistent with the WTO Agreement, and that the United States had "nullified" the rights of Japan under that Agreement.

Consequently, the issuance of a preliminary injunction prohibiting TKS from commencing an action under the Special Measures Law would be clearly destructive of international comity under any standard, inasmuch as it entirely disregards the balance of remedies and obligations established by the WTO, to which both the United States and Japan have acceded. The court of appeals' holding, therefore, is wholly consistent with "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987).

III. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH NO DECISION OF THIS COURT.

Amici law professors seek to demonstrate that the court of appeals' view of ancillary or supplemental jurisdiction is somehow needlessly "confine[d]," in conflict with this Court's decisions. See Law Professors' *Amicus* Br. at 8. The most direct rebuttal is that petitioner itself has failed to perceive or assert any such conflict. In addition, the court of appeals articulated its understanding that there may, indeed, be reasons supporting ancillary jurisdiction more broadly in other contexts, but that no jurisdiction existed on these unique facts. Pet. App. 29a n.9. The

Goss court had no occasion to address the broad question posed by the law professors – whether a federal court will usually possess ancillary jurisdiction after a judgment has been satisfied.

Instead, the Eighth Circuit's decision accords with the general rule, articulated by this Court, that a court retains jurisdiction "*until* satisfaction of the judgment." Pet. App. 21a (citing *Peacock* v. *Thomas*, 516 U.S. 349, 356-57 (1996) (emphasis in original)). Once, however, a judgment is satisfied, there must exist a close connection between the separate proceedings before a court would have jurisdiction – post satisfaction of a judgment – to enjoin litigation occurring elsewhere. See *Peacock*, 516 U.S. at 358 (noting that "[i]n determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief sought is of a different kind or on a different principle than that of the prior decree" (internal quotation marks, citations, and alteration omitted)). The Eighth Circuit's fact-bound jurisdictional determination does not conflict with this, or any other, Court precedent. See also *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988) ("[A] federal court [may] prevent state litigation of an issue that previously was presented to and decided by the federal court. [This power] is founded in the well-recognized concepts of *res judicata* and collateral estoppel."); *id.* at 150-51, (affirming anti-suit injunction protecting from relitigating a ruling in earlier federal judgment of dismissal); *cf.* 17A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, *Federal Practice & Procedure* § 4226 (perm. ed. 2007) ("No independent basis of jurisdiction is required for

a federal court to entertain an application to enjoin *relitigation* in state court.") (emphasis added).

Nothing in the Eighth Circuit's decision suggests that it contains a broad holding, as implied by the professors, that subject matter jurisdiction terminates whenever a judgment is paid. Rather, the court of appeals cited *Peacock* only for the limited proposition that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment." Pet. App. 21a. *Goss* simply addresses the particular issues that arise in this case when ancillary jurisdiction cannot be immediately assumed. Indeed, in reaching its conclusion that no ancillary jurisdiction existed here, the court of appeals largely agreed with the law professors that, among the important jurisdictional considerations, courts should look to the ability of the court to function. See Law Professors' *Amicus* Br. at 12 n.16. The *Goss* court concluded, rightly, that the ability of a court to function was not implicated by the foreign action in this case and thus auxiliary jurisdiction does not attach. Pet. App. 21a-23a. Whatever the law professors may think of that ultimate determination, the court of appeals' reasoning was sound and well grounded in this Court's relevant precedents.[5]

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[5] The law professors additionally rely on the Court's holdings in *French* v. *Hay*, 89 U.S. (22 Wall.) 250 (1874), and *Dietzsch* v. *Huidekoper*, 103 U.S. 494 (1880), to argue that antisuit injunctions may be properly issued to prevent the nullification of a federal judgment. As discussed above, *Goss* in no way holds that federal courts are generally without the power to issue antisuit injunctions. The professors' emphasis of the Court's recognition of this power in *French* and *Dietzsch* is therefore without consequence here. Moreover, as discussed *supra* pp. 11-12, the professors' premise that a Japanese action brought pursuant to the Special Measures Law would effect a

IV. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Amici States of New Hampshire and Oregon argue that this Court's review is warranted because Japan's clawback statute – indeed, all clawback statutes – threatens to undermine U.S. domestic courts' ability to effectuate their domestic law judgments. The States argue that this case provides an opportunity for this Court to endorse an unprecedented policy against recognizing foreign clawback statutes in U.S. domestic courts. States' *Amici* Br. at 4-6. As important as these issues may be, no decision by this Court supports the States' desired outcome, and this case presents no opportunity to address the broader issues raised by the two States. Those issues are, at their core, quintessential foreign affairs considerations traditionally addressed on a bilateral diplomatic basis between nations.

Initially, the two States err in asserting that the "judgments" of the district court would be affected in any way by an action in Japan under the Special Measures Law. See *id.* at 10-12. To the contrary, what is at stake is the authority of a *Japanese* court to entertain and adjudicate a claim by a *Japanese* entity that was properly commenced pursuant to domestic *Japanese* law. As canvassed above, the Special Measures Law authorizes TKS's claims

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nullification of the domestic action is unsound. Any action separately brought in Japan would be predicated not upon some theory of the U.S. judgment's impropriety but, rather, would necessarily acknowledge the validity of that domestic judgment. Thus, any potential Japanese action could not be a relitigation and would not then raise the question this Court addressed in both *French* and *Dietzsch* – namely, the contours of federal court power to issue an antisuit injunction in protection of its judgment when a state court action would otherwise proceed to address the *same* issues.

against the Japanese affiliate of Goss under an entirely different cause of action, requiring distinct facts and separate proofs. The U.S. lawsuit under the 1916 Act, other than the bare fact of TKS's payment of damages, will have no relevance to the action in Japan. For this reason, the cases of this Court briefly cited by the *amici* States, see *id.*, are readily distinguished.

More importantly, Japan's clawback statute is unlike other clawback statutes that have generated controversies with foreign governments in the past. Japan enacted the Special Measures Law only after and pursuant to extensive WTO proceedings to correct an unjust result arising from the continued application of the 1916 Act affecting one of its nationals. Japan's law therefore focuses in a limited way on the harm generated by the United States' violation of the WTO Agreement through its failure to repeal the 1916 Act comprehensively – precisely the calibrated response that is anticipated by the Agreement. The international comity considerations weighing in favor of this particular clawback statute are far different from those supporting other clawback statutes. If the two States nonetheless believe that a clawback statute – even of this limited nature – is improper, the appropriate form of redress is diplomatic, not judicial.

Moreover, the Special Measures Law is also distinguished from most other clawback statutes in that it is a targeted measure that applies only to one dispute. As the Eighth Circuit emphasized, "[t]he Special Measures Law has a one-time application: There is no pending litigation under the now-defunct 1916 Act; Goss received the only judgment ever granted under the Act; thus, the only lawsuit possible under the Special Measures Law can be brought

against Goss alone." Pet. App. 24a. Consequently, this case presents a poor backdrop to consider the finding that the two States invite – a categorical holding that *all* foreign clawback statutes deprive a U.S. court of its jurisdiction and *all* foreign actions under a clawback statute should be enjoined. States' *Amici* Br. 4-6. In any case, if this is a recurring issue as claimed by New Hampshire and Oregon in their brief, significantly better vehicles to address this issue will be available to the Court in the future.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. and TKS (USA), INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Michael J. Danaher, *Anti-Antitrust Law: The Claw back and Other Features of the United Kingdom Protection of Trading Interests Act, 1980*, 12 LAW & POL'Y INT'L BUS. 947 (1980) .. 9

TKS' opposition rests on a fallacy—an asserted distinction between "relitigation" of a final federal court judgment, which TKS concedes may be enjoined to protect the judgment, and a clawback action that entirely nullifies a final judgment, which TKS contends may not be enjoined. Astoundingly, TKS maintains that because the Japanese court considering its clawback claim "has no authority to reconsider the issues decided by" the federal court "or to conclude that TKS did not violate" the 1916 Act, but instead is empowered to completely nullify the federal court's final judgment by ordering Goss to repay the judgment in full and all TKS' litigation expenses, the United States judgment has "no relevance to the action in Japan" and does not warrant protection. (Opp. 11, 23.) To state that argument is to refute it. TKS' clawback action—brought under a foreign statute that declares Goss' judgment "invalid" (Pet. 4)—is the most direct assault on the judgment imaginable and will "effectively nullify" it (App. 25a). The suggestion that federal courts may enjoin litigants from revisiting the findings underlying their final judgments, but may not enjoin those litigants from entirely nullifying the same judgments, makes no sense. Neither the other circuits nor this Court have so held; it is not even what the Eighth Circuit held here. In fact, TKS cites *no* authority supporting its extraordinary proposition.

The basis of the Eighth Circuit's decision was that federal courts lack jurisdiction to protect a money judgment once the judgment has been satisfied. (App. 22a.) That holding directly conflicts with the Second Circuit's recent ruling in *Karaha* that federal courts

have continuing jurisdiction to protect a judgment "even after a judgment has been satisfied." (Pet. 16-19.) It also directly conflicts with this Court's teachings that federal courts should act to prevent parties from nullifying final judgments. (*Id.* 32-35; Profs' *Am.* Br. 17-20.) And, it leaves the analysis of comity in antisuit injunction cases in utter disarray. (Pet. 19-25.)

The federal courts' ability to enjoin parties from undermining final judgments is critical to our economy and the integrity of the federal judiciary. As the *amici* explain, and TKS does not dispute, numerous foreign nations have passed clawback statutes to nullify aspects of U.S. law with which they disagree, including treble damage awards under the antitrust laws. The Eighth Circuit's decision permits nationals from such countries to come to the United States to do business and earn profit, yet avoid any consequences for violating the laws enacted to protect U.S. markets.

1. A clawback action is the most extreme form of "relitigation" and the plainest example of undermining a final judgment. Based upon TKS' misconduct within the United States, Goss won a final federal judgment after trial, appeal, and a denial of certiorari. TKS' clawback action seeks to entirely nullify that judgment by requiring Goss to return all its proceeds and TKS' expenses to TKS, the losing defendant in the U.S. suit. Whatever term one uses to describe a clawback action, it is *more* destructive to federal judicial authority than a case where a foreign court fails to respect a judgment as *res judicata*. Under the Special Measures Law, Goss will not even have a chance to retry the factual issues on which it previously prevailed in the domestic action.

The Special Measures Law on its face contradicts TKS' assertions that its clawback action "acknowledge[s] the validity of [the] domestic judgment" and does not seek to relitigate "the validity of the U.S. judgment." (Opp. 18, 22 n.5.) The clawback statute declares that the final U.S. judgment "shall be invalid."[1] (Pet. 4.) The Eighth Circuit bluntly acknowledged that TKS' clawback action would "effectively nullify the remedy Goss legitimately procured in the United States courts." (App. 25a.) Unquestionably, TKS' pending action—which names Goss as a primary defendant under a clawback law that applies to *both* the U.S. plaintiff and its Japanese subsidiaries (*cf.* Opp. 3, 6, 11)—seeks to entirely undo the final judgment addressing TKS' violations of a U.S. statute. (Pet. 3-4.) If relitigation of the issues underlying a final judgment is impermissible, *a fortiori* direct nullification of a final judgment through collateral proceedings is not permitted.

2. TKS' baseless distinction between relitigation and nullification of a U.S. judgment flies in the face of this Court's recognition that an antisuit injunction is proper when the later action could deprive parties of "the substantial fruits of a judgment rendered in their favor." *Dietzsch*, 103 U.S. at 497. Rather than

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[1] In TKS' appeal of the underlying judgment–part of which TKS presented to this Court in 2005 (*see* No. 05-358)–the Eighth Circuit considered an attack on the validity of the U.S. judgment in light of the WTO's finding that the 1916 Act violated U.S. obligations under the WTO Agreements and Congress' prospective repeal of the Act. (*E.g.*, App. 102a-103a n.5.) TKS lost this challenge. Thus, even under TKS' excessively narrow understanding of "relitigation," TKS quite literally seeks to relitigate in Japan the validity of the final U.S. judgment.

becoming caught up in labels, courts consider whether a later lawsuit may undermine or nullify the result of the earlier action. *E.g.*, *International Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 441 F. Supp. 2d 552, 561-62 (S.D.N.Y. 2006) (defendants enjoined from pursuing "their legal rights in Brazil" even though the Brazilian suit would "resolve different questions" because it would "achieve the very same status" that the U.S. court had denied), *aff'd*, 246 F. App'x 73, 80 (2d Cir. 2007). This inquiry looks past verbal characterizations to protect the substance of a judgment "no matter how or when [a party] may attempt to evade it or escape its effect." *Dietzsch*, 103 U.S. at 497.

The cases TKS cites do not suggest that courts permit nullification. In *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, 53 F. App'x 597, 598 (2d Cir. 2002), for example, the Second Circuit held that even if "*res judicata* does not preclude suit in Canada because [the defendant's] claims there were never actually litigated in the district court," an injunction was nonetheless appropriate because a federal court has the "power to enforce its judgments and to prevent the harassment of the prevailing party, whether in the form of vexatious litigation or otherwise." Thus, the Second Circuit upheld the district court's injunction against the defendant's attempt abroad "to discount, delay, avenge or otherwise frustrate the judgment." *Id.*; *see Laker Airways*, 731 F.2d at 927 ("The equitable circumstances surrounding each request for an [antisuit] injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice.").

TKS acknowledges that lower courts use various terminologies in examining whether the later action will undermine or nullify the prior judgment, including whether the actions are "dispositive" of each other, involve "the same liability," or adjudicate "mirror image claims." (Opp. 15.) Here, Goss' final judgment and TKS' clawback action are entirely dispositive of each other and would resolve the same liability. TKS concedes that the only element it must show to win its clawback action in Japan is that it paid the final U.S. judgment to Goss. (*Id.* 6.) Because TKS' clawback action will entirely undermine the U.S. judgment, it is a direct attack on that judgment and should be enjoined.

3. The Eighth Circuit's holding squarely conflicts with the Second Circuit's subsequent ruling in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 129 (2d Cir. 2007), certiorari petition pending, No. 07-619. The Eighth Circuit held that federal courts lack jurisdiction after satisfaction of a judgment. (App. 21a-22a.) In contrast, the Second Circuit held that "federal courts have continuing jurisdiction" to protect a judgment "even after a judgment has been satisfied." 500 F.3d at 129. The Eighth Circuit held that once the judgment was "rendered, paid, and satisfied," neither "the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction to enjoin TKS." (App. 22a.) In contrast, the Second Circuit held that jurisdiction to protect a satisfied judgment continues, "regardless of whether . . . the font of jurisdiction for such an injunc-

tion is characterized as 'ancillary' or otherwise." 500 F.3d at 129.

Underlining this clash, the Eighth Circuit explained that its jurisdictional analysis *would have been different if the judgment had not been satisfied*: "Given the status of the case at the time the injunction issued, the district court maintained ancillary enforcement jurisdiction to preserve the judgment.... However, the jurisdictional circumstances and comity considerations have changed because there is no longer an outstanding judgment to protect." (App. 28a; *see also id.* 26a.) Quoting this passage, TKS simply omits the language attributing the loss of jurisdiction to the change of circumstances caused by TKS' payment of Goss' judgment. (Opp. 8.) As we previously explained (Pet. 17-19), the Eighth and Second Circuits reached these conflicting holdings based upon their differing interpretations of the same precedent of this Court.

Not only are the legal principles applied in this case and *Karaha* flatly at odds, but the facts in *Karaha* are similar to those here. After losing a final judgment in the United States, the defendant in *Karaha* asked the Cayman Islands court to nullify the final U.S. judgment on the theory that it was a product of fraud "such as to vitiate" the underlying arbitration award. 500 F.3d at 117. The defendant there sought return of all damages, including "any sums received or to be received by [the plaintiff] pursuant to any order of the United States District Court . . . enforcing the [arbitration award]." *Id.* (quotation omitted). Similarly, TKS has asked the Japanese court to nullify a final U.S. judgment on the theory that it is contrary to Japan's view of international law articulated in the

Special Measures Law. (Opp. 18.) TKS seeks return of the damages awarded in the United States plus TKS' litigation expenses in the matter. (*Id.* 11.) The two lower court decisions cannot co-exist; either federal courts have jurisdiction to protect their final satisfied judgments from being nullified, or they do not.

4. This Court has consistently held that allowing a subsequent non-federal action to nullify a final federal judgment "would be contrary to the plainest principles of reason and justice." *French v. Hay*, 89 U.S. 250, 253 (1874); *Dietzsch*, 103 U.S. at 497; *see Dugas*, 300 U.S. at 428. As the *amici* law professors explain, the only potential distinction between this Court's *French* and *Deitzsch* decisions and the Eighth Circuit's decision here is that the attack on the final judgment in this case arises in a foreign court. (Profs' *Am.* Br. 17-20.) A federal court's jurisdiction to enjoin a party from prosecution of a foreign action to nullify a final federal judgment is no less than its jurisdiction to enjoin a domestic state court action.

This Court's decisions also refute TKS' suggestion that the federal courts' jurisdiction to prevent their final judgments from being undermined is restricted to situations in which an attempt is made to raise precisely the "same issues" resolved in the prior action. For example, in *Dugas*, this Court approved an antisuit injunction to prevent Dugas from pursuing a state court action on an appellate bond, which an insurance company posted to guaranty the company would "diligently prosecute its appeal" in the state court. 300 U.S. at 417-18. The company violated the guaranty, abandoning its appeal in favor of a federal interpleader that named Dugas. After the final

interpleader judgment, Dugas sought to collect on the company's state court bond. *Id.* at 420. Although Dugas did not directly seek to upset the final interpleader judgment, and although his state court action solely sought to remedy violations of the state appellate bond, this Court held that federal jurisdiction to enjoin the state suit was "free from doubt" because the state suit would have "contravened the fair intendment" of the federal interpleader. *Id.* at 420, 428. Here, too, TKS' clawback action for return of the damages awarded under the final U.S. judgment contravenes the fair intendment of that final judgment.

5. TKS incorrectly suggests that the final judgment here does not deserve the courts' protection because Congress repealed the underlying statute. To the contrary, Congress was well aware of the judgment in this case (then pending on appeal) and Japan's claims that the WTO Agreements required the 1916 Act to be repealed retroactively. H.R. Rep. 108-415 (2004). Yet Congress determined that the repeal should be prospective and that the WTO Agreements did not require retroactive repeal. *Id.*; 149 Cong. Rec. S7137-01 (May 23, 2003). It carefully crafted the repeal to leave Goss' judgment intact, *despite* Japan's demands to the contrary.[2] The issue now is not the wisdom of the statute enforced by the federal court, but the

[2] The WTO's view is irrelevant to this case both because it cannot trump U.S. law and because Congress has spoken on the matter. In any event, the WTO never addressed whether the WTO Agreements require the United States to retroactively comply with the finding that the 1916 Act was inconsistent with U.S. treaty obligations, nor did it approve the Special Measures Law.

integrity of a final judgment that Congress expressly preserved in the face of Japan's objections.

6. The Eighth Circuit also joined sides in the existing circuit split concerning the role of comity in issuing foreign antisuit injunctions. (App. 11a) (adopting "the conservative approach in determining whether a foreign antisuit injunction should issue"). Comity requires *mutual* respect between nations. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Far from encouraging mutual respect, clawback actions are universally condemned as antithetical to international comity. *See* Lowenfeld, 75 AM. J. INT'L LAW at 637 (clawbacks are "deplorable measure[s]" that go "beyond the pale" and represent "a step backward [] as a matter of international law."); *accord* Danaher, 12 LAW & POL'Y INT'L BUS. at 961 (clawback laws are an "unprecedented offense" against comity and international law). TKS' clawback action is itself an attack on comity and accordingly is undeserving of protection. *See Laker Airways*, 731 F.2d at 939 ("The appellants' claims of comity now asserted in the United States courts come burdened with the failure of the British to recognize comity."). As the Eighth Circuit recognized, the Special Measures Law "like other clawback or blocking provisions, can be regarded as an affront to the laws and judicial rules of the United States." (App. 26a.)

Moreover, comity does not override the jurisdiction of a court addressing matters of domestic concern. *Hartford Fire Ins. v. California*, 509 U.S. 764, 798-799 (1993); *Hilton*, 159 U.S. at 163-64. And, comity has greatly reduced importance where a court acts to protect its final judgment. *See Paramedics*, 369 F.3d

at 655; *Allendale Mut.*, 10 F.3d at 433; *Laker Airways*, 731 F.2d at 928 n.53; *SG Avipro Fin. Ltd. v. Cameroon Airlines*, No. 05 Civ. 655, 2005 WL 1353955, at *2 (S.D.N.Y. June 8, 2005).

7. The Eighth Circuit's decision allows foreign nationals doing business in the United States to use foreign clawback statutes to effectively erase final U.S. judgments, including judgments under our antitrust laws. As the *amici* explain, the Eighth Circuit's holding—that federal courts are powerless to protect satisfied money judgments from foreign clawback actions—has broad application and will undermine the enforcement of U.S. law. The holding leaves no way to distinguish a treble damage suit for dumping from treble damage suits for monopolization, predatory pricing, or price fixing.

Numerous foreign countries have passed clawback actions aimed at nullifying unique aspects of U.S. law with which they disagree. Under the Eighth Circuit's decision, foreign nationals may intentionally violate U.S. antitrust law, on U.S. soil, knowing that if they are found liable they may invoke a clawback statute to nullify the judgment—to use TKS' words—"to correct an unjust result." (Opp. 23.) Giving foreign companies this "free pass" to escape the consequences of violating U.S. law would be highly damaging to the U.S. economy as well as to federal judicial authority.

8. This case is an appropriate vehicle for resolving the circuit split concerning the federal courts' jurisdiction to protect final satisfied judgments. Unlike the Second Circuit's *Karaha* decision, the decision below conflicts with controlling Supreme Court case law. The Second Circuit, by contrast, correctly applied

governing precedent. Furthermore, the Second Circuit's decision arises in the unusual context in which a foreign arbitral award was confirmed in a U.S. court and the antisuit injunction was sought to protect that confirmation. The petition here, by contrast, presents the frequently occurring and important question of whether a federal court's own judgment, giving effect to federal law governing the U.S. economy, may be protected through an antisuit injunction. Finally, this case presents the purest form of a direct attack on a final judgment and, thus, cannot become mired in questions about whether the later action will in fact undermine a final judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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GOSS INTERNATIONAL CORP.,

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TOKYO KIKAI SEISAKUSHO, LTD. and TKS (USA), INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

The Court of Appeals reversed the issuance of an anti-suit injunction because it believed that the district court lacked jurisdiction to issue the injunction after satisfaction of the judgment and because, in the absence of such jurisdiction, international comity weighed against issuance of the injunction. *Amici* will address the following questions:

1. Whether the Court of Appeals' conclusion that the district court lacked jurisdiction is inconsistent with *Pacific Railroad of Missouri v. Missouri Pacific Railway Co.*, 111 U.S. 505 (1884), as well as the historic principle that a trial court possesses the ancillary jurisdiction to conduct further proceedings after satisfaction of judgment.

2. Whether the Court of Appeals' decision to give dispositive weight to concerns for international comity is inconsistent with this Court's decisions authorizing anti-suit injunctions and with the need to enforce Acts of Congress whose violations cause damage on American soil.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are scholars who write and teach in the areas of civil procedure, complex civil litigation, federal jurisdiction, and antitrust. The jurisdiction and authority of a federal court to enforce a judgment in light of a foreign "clawback" statute that seeks to nullify the judgment are important questions in the administration of the American legal system.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice more than ten days before the due date of the intention of *amici curiae* to file this brief. Pursuant to Rule 37.6, *amici* state that no counsel for any party in this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The following non-party made an in-kind donation for the printing of this brief: Midwest Law Printing Company.

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INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case presents issues of jurisdiction, equity, and international comity that require this Court's resolution. As we understand the facts, in 2003 the petitioner, Goss International, obtained a judgment under the Antidumping Act of 1916, 15 U.S.C. § 72 (2000) (repealed 2004), against the respondents, which are a Japanese corporation and its wholly-owned American subsidiary. The consonance between the Antidumping Act and the obligations of the United

States as a member of the World Trade Organization had been the subject of international friction. In 2004, after judgment in this case had been entered but before Congress prospectively repealed the Antidumping Act, the Government of Japan enacted a "clawback" statute known as the Special Measures Law. This law declared judgments rendered under the Antidumping Act to be invalid, and created a claim under which a Japanese corporation that had lost a case under the Antidumping Act could obtain from the plaintiff reimbursement for its damages, costs, or attorneys' fees. If successful, such an action would effectively deny a plaintiff the benefits of a judgment rendered by an American court.

In 2006, after unsuccessful appeals had run their course, the respondents indicated their intention to file an action in Japan under the Special Measures Law. On June 15, 2006, the district court that had entered judgment against the respondents preliminarily enjoined them from bringing such an action. Four days later, the respondents paid the judgment in full. Two days after that, without first asking the district court to reconsider its injunction in light of the judgment's satisfaction, the respondents filed an appeal from the preliminary anti-suit injunction.

2. In the decision now under review, the Court of Appeals for the Eighth Circuit vacated the preliminary injunction and remanded the case with instructions to dismiss Goss's motion for a permanent anti-suit injunction. According to the Court of Appeals, the case turned on a single critical fact: the respondents' satisfaction of the judgment on June 19, 2006. In the analysis of the Court of Appeals, the satisfaction had three important consequences.

First, the satisfaction deprived the district court of jurisdiction to issue an anti-suit injunction. (Pet. 19a-22a; 28a.) The Court of Appeals conceded that "[t]he district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment" (Pet. 21a; *see also* Pet. 22a, 28a), but that this jurisdiction ended once the respondents had satisfied the judgment. The Court of Appeals also stated that the All Writs Act, 28 U.S.C. § 1651 (2000), created no "independent source of federal jurisdiction." (Pet. 20a.)

In the Court of Appeals' judgment, the second consequence of the satisfaction was the elimination, or at least reduction, of international comity as a relevant concern in the context of foreign anti-suit injunctions. Unfortunately, the Court's discussion is not a model of clarity. It began by indicating its agreement with the "conservative approach" that afforded great weight to international comity when considering the propriety of an anti-suit injunction against foreign litigation. (Pet. 8a-11a.)[2] In a dizzying few paragraphs, however, the Court of Appeals then contended that:

- After satisfaction of the judgment, "the role of comity for antisuit injunction purposes essentially is moot because there is no longer tension with the foreign country over *concurrent* jurisdiction. Instead, the doctrine of res judicata should

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[2] The opinion of the Court of Appeals, as well as Goss International's Petition for a Writ of Certiorari (*see* Pet.16-26), recognized the deep and recurring division among the courts of appeals on the proper weight to accord international comity in requests for anti-suit injunctions.

apply as a defense to further litigation of the same issues." (Pet. 22a);

- The "doctrines of res judicata and collateral estoppel . . . are inapplicable here." (Pet. 23a.); and
- "Our consideration of international comity," which it had just described as "moot," nonetheless informed its judgment about the balance between American and Japanese interests in the case.

Logical consistency of this analysis aside, the Court of Appeals evidently regarded the satisfaction of the judgment as having a bearing on the outcome of the case (*see also* Pet. 28a).

Third, the Court of Appeals used the satisfaction of the judgment to free itself from the "abuse of discretion" standard under which courts of appeals are required to review the issuance of preliminary injunctions. The Court of Appeals admitted, as it had to, that abuse of discretion was the correct standard for reviewing the district court's decision in this case. (Pet. 15a.)[3] Nonetheless, in reversing the district

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[3] The "abuse of discretion" standard applies only to certain aspects of the decision to grant or deny a preliminary injunction. Whether the district court used the right factors in analyzing whether to issue a preliminary injunction is a question of law, reviewed *de novo*. Factual findings relevant to the issuance of the injunction are reviewed for clear error. The application of the facts to the factors is a matter of discretion, reviewed for abuse. *See* Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418 (2006); St. John's United Church of Christ

(continued...)

court's judgment, it specifically refused to "decide whether the district court abused its discretion in issuing the preliminary injunction" (Pet. 28a) on June 15, 2006. Rather, because it believed that "the jurisdictional circumstances and comity considerations . . . changed" after the satisfaction on June 19, 2006 (Pet. 28a), the Court of Appeals decided *de novo*, without the benefit of any district court ruling on the effect of the satisfaction, that "under the facts of this case, the maintenance of the antisuit injunction on a satisfied judgment cannot be justified" (Pet. 29a).

3. Because the district court had jurisdiction to issue the injunction, and because the district court's balancing of American and international interests was not an abuse of discretion, the decision of the Court of Appeals was wrong. First, the Court of Appeals' conclusion that ancillary jurisdiction did not provide a post-satisfaction jurisdictional basis for the anti-suit injunction lacks any warrant. By the nineteenth century, it was commonplace for a court, whether sitting in law or equity, to entertain a motion or independent action to award relief after satisfaction. Indeed, this Court has long recognized that a court has ancillary jurisdiction to exercise its equitable powers to award appropriate post-satisfaction relief.

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[3] (...continued)
v. City of Chicago, 502 F.3d 616 (7th Cir. 2007). Here the Court of Appeals agreed with the district court's selection of relevant factors. (Pet. 12a n.4.) It did not disagree with any of the district court's factual findings. Its only disagreement concerned the district court's application of the facts to the factors (*see* Pet. 12 & 12a n.4) — a question to which the "abuse of discretion" standard applies.

Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U.S. 505 (1884); *Dietzsch v. Huidenkoper*, 103 U.S. 494 (1880); *United States v. Beggerly*, 524 U.S. 38 (1998).

Second, an anti-suit injunction was the appropriate relief to award in this case. Anti-suit injunctions enjoy a long pedigree. In such cases as *French v. Hay*, 89 U.S. 250 (1874), and *Dietzsch*, 103 U.S. 494, this Court affirmed the propriety — indeed, the necessity — of anti-suit injunctions to prevent efforts in state courts to "claw back" the fruits of a plaintiff's federal judgment. The only — albeit important — distinction between those cases and this one is the international context. But even here, the Court of Appeals failed to apply notions of international comity appropriately, by giving excessive weight to the interests of the Government of Japan and insufficient weight to the effect of clawback statutes on American law and policy.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE SECOND CIRCUIT THAT A DISTRICT COURT HAS ANCILLARY JURISDICTION TO AWARD EQUITABLE RELIEF EVEN AFTER A JUDGMENT IS SATISFIED

The decision of the Court of Appeals turns on its belief that the district court lacked jurisdiction to enter an anti-suit injunction once the respondents had

satisfied the judgment. In fact, this attempt to confine a court's jurisdiction to award relief to the time before satisfaction has neither historical nor legal warrant. Because a federal court has jurisdiction to exercise its equitable powers after satisfaction, the decision of the Court of Appeals must be reversed.

It is likely true, as the Court of Appeals said, that the All Writs Act, 28 U.S.C. § 1651 (2000), creates no independent statutory basis for federal jurisdiction to award such relief. *See Syngenta Crop Prot. Corp. v. Henson*, 537 U.S. 28 (2002). It is also true that, after the satisfaction of the judgment, a district court no longer possesses ancillary enforcement jurisdiction, at least in the limited sense in which the Court of Appeals used that term: Once a judgment has been satisfied, a court no longer needs any power to enforce the defendant's obligation to pay.[4] But these two propositions tell far less than the whole story. Sometimes it is necessary for a federal court to award relief

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[4] It is in this light that the Court's statement in *Riggs v. Johnson County*, 73 U.S. 166, 187 (1867) — "that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied" — must be understood. In *Riggs*, a plaintiff had been unable to execute on a federal judgment. *Riggs* held that the federal court that had rendered the judgment possessed the ancillary jurisdiction to issue orders enforcing the judgment, despite a state-court injunction that sought to prevent enforcement. Nothing in the facts or holding of *Riggs* suggests that the Court was *limiting* the ancillary jurisdiction of a court to awarding pre-satisfaction relief. In any event, the cases cited in this Brief — *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505 (1884); *Dietzsch v. Huidenkoper*, 103 U.S. 494 (1880); and *United States v. Beggerly*, 524 U.S. 38 (1998) — all postdate *Riggs*.

after a judgment is satisfied. In these situations, a federal court has the ancillary jurisdiction to do so.

To begin, both at common law and in equity, courts had the power to award further relief after a judgment's satisfaction. As one treatise explained:

> . . . [T]he mere fact that a judgment has been satisfied will not prevent the court which rendered it, under proper circumstances, from vacating it on motion. There would seem to be on principle no reason why a court of equity might not afford relief against such a judgment in a case calling for equitable relief.[5]

At common law, such post-satisfaction powers included the power to correct a judgment,[6] the power to amend a judgment to award additional monetary relief on related claims,[7] the power to reopen a judgment based on newly discovered evidence,[8] and the power to set a judgment aside.[9] Indeed, common-law pleading contained a series of writs now "shrouded in

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[5] *See* 3 A.C. FREEMAN, FREEMAN ON JUDGMENTS § 1187 (Edward W. Tuttle rev., 5th ed. 1925) (The Lawbook Exchange Ltd. 1993). *See also* 1 FREEMAN, *supra*, § 206 ("Generally, . . . the fact that a judgment may have been paid or discharged does not defeat the right to have it opened or vacated in furtherance of justice, where an otherwise proper case is made for such relief . . . .").

[6] Partridge & Co. v. Harrow, 27 Iowa 96 (1869).

[7] Hatch v. Cent. Nat'l Bank, 78 N.Y. 487 (1879).

[8] British & Am. Mortgage Co. v. Strait, 65 S.E. 1038 (S.C. 1909).

[9] Hogg v. Christenson, 149 N.W. 562 (N.D. 1914); Barker v. City of Seattle, 166 P. 1143 (Wash. 1917).

ancient lore and mystery"[10] — such as the various writs of scire facias,[11] the writ of audita querela,[12] and the related writs of coram nobis and coram vobis,[13] — that could be used after satisfaction of a judgment. Even more significant powers belonged to equity, which, after satisfaction, could set aside a judgment procured by fraud, mistake, or wrongful action.[14] In addition, "[r]elief may be had in a variety of forms,

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[10] Fed. R. Civ. P. 60 advisory committee's note (1946).

[11] For one use of this writ, see Cowles v. Bacon, 21 Conn. 451 (1852). In addition, the writ of scire facias *ad rehabendam terram* returned to a judgment debtor any lands taken in execution once the debtor otherwise satisfied the judgment. BLACK'S LAW DICTIONARY 1347 (Bryan A. Garner ed., 7th ed. 1999).

[12] On the history of this writ, see Ira P. Robbins, *The Revitalization of the Common-Law Civil Writ of Audita Querela as a Postconviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 GEO. INT'L L.J. 643, 646-55 (1992); *id.* at 655 ("As to matters occurring after an otherwise valid judgment, the rationale for granting relief was that the defendant had fully satisfied the judgment.").

[13] The relief under these writs — to correct factual errors on which a prior judgment was based — was identical; they were differently named because they were directed to different common-law courts. *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 224 (3d ed. 1922). In modern times, the writ of coram nobis has been most used as a post-conviction remedy, particularly after the judgment of conviction has been fully satisfied. Historically, the writ was also available in other civil actions. *See* United States v. Morgan, 346 U.S. 502, 506-08 (1954).

[14] *See* Gates v. Steele, 20 A. 474 (Conn. 1890); Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd., 225 S.W.2d 721 (Tex. App. 2007).

when a judgment appears from the record to be satisfied, but the entry of satisfaction was induced by fraud, mistake, inadvertence, or any other cause not producing an actual satisfaction nor precluding the plaintiff from pursuing appropriate remedies to reinstate his judgment."[15] Coming forward to modern times, Rule 60 of the Federal Rules of Civil Procedure permits, by motion or independent action, a court to order relief from a judgment. The powers described in Rule 60 do not disappear upon a judgment's satisfaction; indeed, Rule 60(b)(5), which allows certain relief from a judgment that "has been satisfied," specifically contemplates that a court can award relief after satisfaction.

The lesson to draw from this history is that the satisfaction of a judgment does not terminate a court's power to award appropriate additional relief concerning that judgment. Admittedly, that fact is distinct from the jurisdictional question: Even assuming that a court has the ability to award post-satisfaction relief, does a *federal* court have the subject-matter *jurisdiction* to do so? Historically, however, the court that rendered the judgment was the court that awarded relief after satisfaction of the judgment. Unsurprisingly, therefore, this Court has held that, when a federal court renders a judgment, it has the ancillary jurisdiction to award appropriate post-

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[15] 2 FREEMAN, *supra* note 5, § 1166. *See* Borsheim v. O & J Props., 481 N.W. 590, 595-96 (N.D. 1992) ("[A] party who releases a judgment through mistake, fraud, or upon failure of the consideration for the release, is entitled to have the judgment reinstated if necessary to avoid unjust enrichment.").

satisfaction relief.[16]

The leading case is *Pacific Railroad of Missouri v. Missouri Pacific Railway Co.*, 111 U.S. 505 (1884). In *Pacific Railroad*, plaintiffs in a prior suit foreclosed on mortgaged property. The prior suit had been filed in federal court due to diversity of citizenship. *See Pacific Railroad v. Ketchum*, 101 U.S. 289 (1880). The defendant railroad, a Missouri citizen, lost the suit in June, 1876. In September, 1876, the property was sold pursuant to the federal court's decree. In October, 1876, the district court confirmed the sale. In April, 1880, this Court affirmed the decree. *Ketchum*, 101 U.S. 289.

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[16] Two types of ancillary jurisdiction exist: jurisdiction over claims that are "factually interdependent" on the principal claims in a case; and jurisdiction to take actions needed "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Peacock v. Thomas, 516 U.S. 349, 354 (1996); *see* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379-80 (1994). Jurisdiction in this case falls into the latter category.

It is an interesting, but ultimately academic, question, whether the district court's jurisdiction in this case is better styled as "ancillary" or "supplemental." In 28 U.S.C. § 1367 (2000), Congress granted "supplemental jurisdiction" over certain claims that had formerly fallen into the related categories of ancillary and pendent jurisdiction. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005). But § 1367 particularly concerns the first type of ancillary jurisdiction — jurisdiction over factually interdependent claims — not the second type. Consequently, we believe that it is better to describe the district court's jurisdiction in this case as ancillary. But nothing of consequence turns on the label.

At that point, the judgment in *Ketchum* was final, and the plaintiffs were fully satisfied. Nonetheless, believing the judgment to have been infected with fraud, the railroad brought a bill in equity to "impeach and vacate" the decree. *Pacific Railroad*, 111 U.S. at 506. The railroad filed the bill in the federal court that had entered the original decree. Because the bill named Missouri citizens as defendants and presented no federal questions, the federal court had no independent jurisdiction to entertain the bill. This Court nonetheless held:

> Upon the question of jurisdiction there can be no doubt that the circuit court, as the court which made the *Ketchum* decree, and had jurisdiction of the *Ketchum* suit, as this court, in *Pacific R. R. v. Ketchum*, 101 U. S. 289, held it had, has jurisdiction to entertain the present suit to set aside that decree on the grounds alleged in the bill, if they shall be established as facts, and if there shall be no valid defense to the suit, although the plaintiff and some of the defendants are citizens of Missouri. The bill falls within recognized cases which have been adjudged by this court, and have been recently reviewed and reaffirmed in *Krippendorf v. Hyde*, 110 U. S. 276. On the question of jurisdiction the suit may be regarded as ancillary to the *Ketchum* suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties . . . . The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the circuit court. [111 U.S. at 521-22.]

Similarly, *Dietzsch v. Huidenkoper*, 103 U.S. 494 (1880), held that a federal court has ancillary jurisdiction to award an anti-suit injunction. In *Dietzsch*, after a replevin action had been removed to federal court, the state court nonetheless proceeded to give judgment to the plaintiffs. The federal case came to the opposite conclusion. Ignoring the federal judgment and relying on the state judgment, the plaintiffs then commenced a state-court proceeding to collect the replevin bond, which had been given in the state-court replevin action to secure the value of the property. The federal court enjoined the plaintiffs from trying to collect on the bond. *Dietzsch* regarded the bill seeking an anti-suit injunction to be "ancillary" to the main proceeding. 103 U.S. at 497. In combination, *Pacific Railroad* and *Dietzsch* show that a federal court possesses the necessary jurisdiction to issue an anti-suit injunction even after all proceedings in the original action have concluded.

The rule in *Pacific Railroad* remains good law. In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court relied on *Pacific Railroad* to find jurisdiction over a quiet title action in which the plaintiffs sought to set aside a prior federal judgment. The prior case, also a quiet title action, concluded after the Government paid the plaintiffs $208,000; the prior judgment was, in other words, satisfied. Twelve years later, based on newly discovered evidence of their ownership, the plaintiffs commenced a new quiet title action in the federal court that had decided the prior case. Because the Government had not waived its sovereign immunity, this action, seeking to reopen a satisfied judgment, lacked an independent basis of subject-

matter jurisdiction. Nonetheless, this Court held that the action lay within the district court's ancillary jurisdiction. As the Court stated, ancillary jurisdiction exists over an "independent action," an equitable proceeding that can be used "to prevent a grave miscarriage of justice," *id.* at 47. *See id.* at 46 ("The Government is therefore wrong to suggest that an independent action brought in the same court as the original lawsuit requires an independent basis for jurisdiction.") The exemplar of an independent action that the Court cited was *Pacific Railroad*. *Id.* at 45.

The jurisdictional analysis of the Court of Appeals fails to hold up against these precedents. Its analysis also conflicts with that of the Court of Appeals for the Second Circuit. In *Karaha Bodas Co. v. Perussahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007), a judgment debtor sought to undermine federal judgments that confirmed and enforced an award in arbitration by filing a fraud action in a foreign country. That action would have forced "return of the funds that had been paid over pursuant to the award." *Id.* at 112. As in this case, the foreign proceedings sought to "claw back" the proceeds used to satisfy a judgment. The Court of Appeals held:

> . . . [W]e conclude that federal courts have continuing jurisdiction, grounded in the concepts of res judicata and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court. This source of jurisdiction remains even after a judgment has been satisfied — regardless of whether (1) the judgment is one of

> dismissal or (2) the font of jurisdiction for such an injunction is characterized as "ancillary" or otherwise. [500 F.3d at 129.]

The Second Circuit cited, and specifically rejected, the narrow view of ancillary jurisdiction offered by the Court of Appeals in this case. *Id.* at 128.[17]

In short, the Court of Appeals' novel effort to deny federal courts their inherent post-satisfaction ancillary jurisdiction has no basis in history or in law. The Court of Appeals in this case neither cited nor considered *Pacific Railroad*, *Dietzsch*, and *Beggerly*. The first court of appeals to consider this distinction has now rejected it. In fact, the district court had, and has, the jurisdiction to grant appropriate post-satisfaction relief. Because the decision of the Court of Appeals turned on its erroneous view of ancillary jurisdiction, and because the issue is one of long-standing and recurring importance for the proper enforcement of federal judgments, this Court should grant the Petition for a Writ of Certiorari.

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[17] We understand that a petition for a writ of certiorari has also been filed in *Karaha Bodas*. *See* Petition for a Writ of Certiorari, No. 07-619.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE ANTI-SUIT INJUNCTION THAT THE COURT OF APPEALS OVERTURNED WAS AN APPROPRIATE REMEDY THAT BALANCED CONCERNS FOR INTERNATIONAL COMITY AND EFFECTIVE ENFORCEMENT OF ANTITRUST POLICY

As *Beggerly* recognizes, jurisdiction to revisit a satisfied judgment is a distinct question from the appropriateness of awarding relief respecting that judgment. *Beggerly*, 524 U.S. at 46. Weighing the relevant interests, the district court became convinced that an anti-suit injunction was the appropriate relief in this case. The Court of Appeals decided that the constellation of comity considerations and a satisfied judgment made the injunction an inappropriate form of relief. In doing so, the Court of Appeals disregarded the strong judicial interests, long recognized by this Court, favoring an anti-suit injunction against proceedings that nullify a federal judgment. It also failed to respect the balance of comity concerns that the district court had struck, or to consider the effects of its ruling on American antitrust law and policy.

A. The Decision of the Court of Appeals Ignored Decisions of This Court Recognizing the Propriety of an Anti-Suit Injunction as a Means of Preventing the Nullification of a Federal Judgment

The power of a federal court to issue an anti-suit injunction in the circumstance that Goss International faces is beyond cavil. For instance, in *French v. Hay*, 89 U.S. 250 (1874), and *Dietzsch v. Huidenkoper*, 103

U.S. 494 (1880), this Court affirmed anti-suit injunctions issued against parties who sought to avoid the consequences of federal judgments through proceedings in state court. In *French*, a Virginia state court issued a judgment against a debtor, and the creditor immediately sought to execute on the judgment by commencing a case in Pennsylvania. Before the Pennsylvania case was heard, the debtor removed the Virginia case to federal court and sought to vacate the Virginia judgment. The federal court in Virginia issued a preliminary anti-suit injunction forbidding the creditor from continuing to proceed with the Pennsylvania case while it considered the debtor's request. Subsequently, the federal court vacated the Virginia decree, and permanently enjoined the creditor from pursuing the Pennsylvania action. *French*, 89 U.S. at 251. This Court affirmed the anti-suit injunction, and spoke powerfully its importance:

> If [a preliminary and permanent injunction] could not be given in this case the result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice. In that event the payment of the annulled decree may be enforced in Pennsylvania, and Hay, notwithstanding the final decree in that case, and in this case, would find himself in exactly the same situation he would have been if those decrees had been against him instead of being in his favor. They would be nullities as regards any protection they could have given him. Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a

> new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. [*Id.* at 253.]

Likewise, in *Dietzsch*, a federal court enjoined, first preliminarily and then permanently, certain parties from proceeding to collect on a replevin bond in state court. The parties' action on the replevin bond followed a state-court judgment in their favor on the underlying replevin action. Because the underlying replevin action had been removed to federal court before the state court issued its judgment, however, the state-court judgment was void; indeed, the federal court ultimately decided the case against the parties. Their action on the bond was, in effect, "equivalent to an actual return of the replevied property," 103 U.S. at 497, to which the federal court had determined that they were not entitled. As the Court recognized, the anti-suit injunction, which was "ancillary to the replevin suit," was necessary "in the Federal court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them." *Id.* Echoing *French* that the failure to give an injunction "would be contrary to the plainest principles of reason and justice," *id.*, the Court held:

> As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment

> against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding. [*Id.*]

Both *French* and *Dietzsch* involved attempts to "claw back," through state proceedings, property to which a federal judgment had deemed them not entitled. Both cases affirmed the district courts' decisions to enjoin such attempts. Of particular significance in both *French* and *Dietzsch* is the fact that the anti-suit injunctions were made permanent even after the federal judgments had become final and the federal cases had completely run their course — a fact that undercuts the Court of Appeals' erroneous view that the satisfaction of the judgment in this case made the district court's injunction unnecessary.

Indeed, the only way to distinguish this case from *French* and *Dietzsch* is to suggest that neither involved an injunction issued in the international context. As the following two sections show, however, a full consideration of international comity interests actually adds strength to the district court's decision to enjoin the respondents, weakens the Court of Appeals' reversal of that injunction, and provides further grounds for this Court to grant the Petition.

B. The Court of Appeals' Ruling Fails to Appreciate that Foreign Clawback Statutes Themselves Are an Affront to International Comity

This Court should review the Court of Appeals' decision to vacate the anti-suit injunction because it

was "contrary to principles of comity [for the Court of Appeals] to prevent TKS from seeking an action under the Special Measures Law in Japan." (Pet. 26a.) The Court of Appeals took an excessively narrow view of comity's demands. Specifically, it failed to appreciate that a clawback statute itself is an affront to comity.

The Court of Appeals mistakenly concluded that Japan's Special Measures Law was in some sense independent of the litigation under the 1916 Act.[18] However, the Special Measures Law is a classic clawback statute in the sense that it "enables a defendant who has paid judgment damages in an overseas country to recover that judgment from the successful plaintiff in the defendant home country." Joseph E. Neuhaus, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1097-98 (1981). The purpose of Japan's Special Measures Law is to reverse the judgment of a United States court.

A clawback statute like the Special Measures Law inherently damages the comity between courts and legislatures in Japan and the United States. It is of no use to pretend otherwise. The Court of Appeals' cramped view that comity concerns do not exist once the U.S. judgment is finalized — and that the matter now exclusively rests with Japanese judges — does

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[18] Pet. at 23a (noting that TKS "now seeks to litigate in Japan a cause of action solely available in Japan and not previously litigated in the antidumping litigation" and that "[t]he issues are not the same simply because TKS's cause of action under the Special Measures Law rests on the imposition of an adverse judgment against TKS under the 1916 Act").

not ring true. As Justice Story recognized over 140 years ago:

> [E]very nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals. It is not to be taken for granted, that the rule of the foreign nation, which complains of a grievance, is right, and that its own rule is wrong.

JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 34-35 (6th ed. 1865) (footnotes omitted). This concern is uniquely presented on the facts of this case, which involve the award of treble damages; American courts have an ongoing interest in ensuring the enforcement of punitive measures against those who commit acts that intentionally cause injury within the United States.

The Court of Appeals limited comity's application solely to parallel suit injunctions aimed at avoiding inefficient dual proceedings. However, comity informs many other international civil litigation issues such as discovery, service of process, and most relevantly here, recognition of judgments. Furthermore, legislative comity, "the respect sovereign nations afford each other by limiting the reach of their laws," is also relevant here. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). That comity "is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted." *Id.* By so quickly deciding to vacate the anti-suit injunction, the Court of Appeals undermined Congress' own comity-informed judgment.

C. *The Court of Appeals' Ruling Threatens to Provide an End Run Around Settled International Consensus on the Use of the Effects Test in Antitrust*

The Court of Appeals effectively created an end run around the effects test in international antitrust cases. The principle, associated with the landmark *Alcoa* case, that antitrust laws apply to overseas acts with intentional domestic effect, *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.), has become well-accepted by antitrust enforcers for many nations. *See, e.g, Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Ahlstrom-Osakeythio v. Comm'n (Wood Pulp)*, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901 (asserting jurisdiction over an agreement by firms outside the then-European Community (EC) to fix prices of product sold to EC buyers on the grounds that conduct by firms outside the EC that 'has the object and the effect of restricting competition within' the EC violates article 85 of the Treaty of Rome (now article 81)); Japan Fair Trade Commission, *Notification System Concerning M&As by Companies outside Japan* (Jan. 1, 1999) (importing an effects doctrine into merger review).

While the 1916 Act is not an antitrust statute, there are clear commonalities between antidumping actions in trade law and antitrust cases, particular those based on predatory pricing allegations. Alan O. Sykes, *Countervailing Duty Law: An Economic Per-*

spective, 89 COLUM. L. REV. 199, 243 (1989) (observing the economic logic by which trade violations could be remedied either by countervailing duties or antitrust lawsuits). As a result, the Court of Appeals' decision creates costly uncertainty concerning whether international antitrust violations will be punishable. In particular, the Court of Appeals' decision may encourage foreign firms guilty of anticompetitive conduct aimed at the U.S. market to seek special home-country legislation unburdening them of their liability after the fact. Such a result would erode an important point of consensus that has been reached among global antitrust enforcers. This Court should consider the wisdom of an unnecessary holding that upsets this equilibrium.

CONCLUSION

We respectfully request the Court to grant the Petition for Writ of Certiorari.

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In The
Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE STATES OF NEW HAMPSHIRE AND OREGON AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by holding that once a defendant pays a money judgment, the federal courts lose jurisdiction to maintain an injunction precluding the defendant from pursuing litigation in a foreign court to nullify the U.S. judgment.

2. Whether the Eighth Circuit erred by giving dispositive weight to concerns about international comity at the expense of the courts' traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation.

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BRIEF FOR THE STATES OF NEW HAMPSHIRE AND OREGON AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of the States of New Hampshire and Oregon as *amici curiae* in support of the petition for writ of certiorari in the above-captioned matter.[1]

INTEREST OF THE *AMICI CURIAE*

The *amici* states enforce antitrust and consumer fraud statutes to protect their citizens. Many of these statutes have multiple damage components to discourage potential violations. A number of the statutes also have "private attorneys general" provisions, which permit private actions and create a further disincentive for violation of antitrust and consumer fraud laws. The threat of private enforcement, together with the bite of multiple damages, dissuades foreign entities from practices that hurt the public in the *amici* states. Federal antitrust and consumer fraud laws likewise discourage foreign companies from engaging in behavior that is directly detrimental to the states' economies and consumers. The decision below eviscerates the deterrent effect of these federal

[1] Counsel of record for all parties received timely notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief

and state statutes by leaving the door open to foreign companies to claw back any judgments rendered under such statutes. Thus, the decision poses a grave threat to the health of the economy and to protections granted to consumers of the *amici* states. Neither the spirit nor the letter of U.S. law allows culpable companies (foreign or otherwise) found to be actively violating U.S. law to escape liability for their actions through a foreign "clawback" statute, or otherwise.

Amicus State of New Hampshire has an interest in the outcome of this case for an additional reason. During the pendency of the underlying case, the petitioner's predecessor was forced into bankruptcy and shut down all of its facilities in the United States; since then, Goss International Corporation ("Goss") has been able to once again maintain a U.S. manufacturing facility – in New Hampshire. In accordance with congressional intent, which Congress expressed by leaving the judgment in this case untouched when Congress repealed the underlying statute to conform to WTO requirements, Goss should retain the judgment and have the funds available to rebuild Goss' domestic manufacturing capacity, which employs New Hampshire residents

In addition, each of the *amici* states are responsible for citizens who face the day-to-day consequences of losing jobs or investments due to dishonest business schemes. As such, the *amici* states have a direct interest in maintaining the integrity of the domestic markets for consumers – an integrity threatened by the lower court's decision. Simply put,

foreign corporations should not be able to escape the penalties U.S. and state courts assign them. The *amici* states urge the Court to grant certiorari and reverse the court's decision below.

SUMMARY OF THE ARGUMENT

The *amici* states make two principal points. First, the *amici* states demonstrate that culpable parties will be improperly shielded from liability if the decision below stands. Such culpable parties include foreign corporations, such as the Respondents, who did business in the United States, intentionally violated U.S. law, and made millions of dollars in ill-gained profits at the expense of U.S. entities and ultimately consumers. Under the decision below, foreign corporations have the ability to violate U.S law and avoid judgment for such violations by recovering awards under foreign clawback statutes. The *amici* states oppose a rule that would allow defendants to escape liability, avoid payment of treble damages, and retain ill-gained profits. Culpable parties of all types must be deterred for the markets to function properly. Without the deterrence that antitrust and consumer protection laws provide, citizens of the *amici* states and state economies are vulnerable to unscrupulous business practices by foreign corporations.

Second, the ramifications of the decision below are far reaching, and will undermine antitrust and

consumer protection laws. Without the sanction of treble damages, the integrity and competitiveness of the markets is jeopardized. The deterrent effect of domestic damage statutes is lost on foreign corporations if they believe they might avoid such damages through a foreign clawback action. Domestic businesses, on the other hand, must still abide by consumer protection laws or face the penalty. This places U.S. companies at a disadvantage.

ARGUMENT

I. U.S. COURTS MUST BE ABLE TO REQUIRE COMPANIES THAT DO BUSINESS IN THE UNITED STATES TO FOLLOW U.S. LAW.

A. Foreign Clawback Statutes Allow Foreign Companies to Escape U.S. Law.

This case presents issues of exceptional economic importance to the *amici* states. If, as the court below held, U.S. courts are unable to prevent foreign companies from recouping satisfied judgments through foreign clawback actions, foreign companies will have an increased incentive to violate domestic laws. In the decision below, the Respondents successfully argued that the court could not enjoin the Respondents from filing a "clawback" suit in Japan seeking the damages that the court awarded on a jury verdict for the Petitioner, Goss. The jury found the Respondents violated U.S. law by "dumping" millions of

dollars of equipment on the U.S. market with the intention of destroying or injuring Goss. The Respondents sued Goss in Japan for about $38 million, representing exactly what the trial court awarded to Goss in this case including the $31,619,847 damage award and the attorneys' fee awards. If this Court does not revisit the lower court's decision, the Respondents, who are demonstrably culpable parties, will be improperly shielded from liability. If the lower court's decision is not reversed, foreign corporations will have the ability to violate U.S. law and avoid judgment for such violations by recovering awards under foreign clawback statutes. The *amici* states oppose a rule that would allow defendants to escape liability, avoid payment of damages and retain these profits. Without the deterrence that antitrust and consumer protection laws provide, citizens of the *amici* states and their domestic economies are vulnerable to unscrupulous business practices.

Unfortunately, Japan is not alone in enacting a clawback statute. In fact, double or treble damage judgments have become the focal point for foreign clawback statutes, which permit foreign defendants to avoid domestic damage awards. For example, Britain's Protection of Trading Interest Act permits recovery of the multiple damages portions of any U.S. judgment, not just antitrust judgments. *See* Protection of Trading Interests Act, 1980, c. 11, § 6 (U.K.). Australia has a clawback statute that permits recoupment of both the actual damages and the treble damages of any U.S. antitrust judgment. *See* Foreign

Proceedings (Excess of Jurisdiction) Act, 1984, No. 3, § 10 (Austl.). Similarly, the European Union has enacted clawback statutes aimed at U.S. judgments under the Helms-Burton Act or the Iran and Libya Sanctions Act. *See* Council Regulation 2271/96, art. 6, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, 1996 O.J. (L309) 39 (EC).

B. The Eighth Circuit Allows Foreign Corporations to Avoid the Multiple Damage Statutes that Congress and the *Amici* States' Legislatures Enacted to Protect the Public.

It is precisely the enforcement of double or treble damage judgments that is of critical importance to the *amici* states. State legislatures enact these statutes specifically in areas of heightened importance to the *amici* states, such as the protection of the states' economies or their consumers' welfare. For example, the New Hampshire legislature authorizes double to treble damages for willful violations of the state's antitrust laws. *See* N.H. Rev. Stat. Ann. § 356:11. Likewise, the New Hampshire legislature has long required double to treble damages for willful violations of its consumer protection laws. *See* N.H. Rev. Stat. Ann. § 358:A-10. Other areas deemed to be critical to the state's interest are also subject to multiple damages. For example, the legislature authorized treble damages for certain violations of the state's environmental laws. *See* N.H. Rev. Stat.

Ann. § 147:58. The federal antitrust laws similarly provide important protections for the economies of the *amici* states by imposing treble damage awards for violations.

In addition, Congress and the *amici* states' legislatures have created private causes of action to ensure enforcement of most of the statutes involving multiple damages. For example, both New Hampshire's antitrust and consumer protection statutes call for private enforcement. *See* N.H. Rev. Stat. Ann §§ 356 11, 358-A:10. The Clayton Act also gives a private cause of action to all those injured by violations of the federal antitrust laws. 15 U.S.C. § 26. The legislatures have increased the likelihood that a violator will be held liable for violating one of these important statutes by authorizing private parties, as well as the governments, to pursue violations. *See* Kevin S. Marshall, *The Economics of Competitive Injury*, 45 Brandeis L.J. 345, 345 (2007); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.03(b), at 3-31 (3d ed. 2006); Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws. Too Much, Too Little, or Just Right?*, 16 Loy Consumer L. Rev. 303, 310-311 (2004). By permitting a defendant held liable under these laws to evade the damage awards, the lower court removes the deterrent force of these statutes.[1]

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[1] As a practical matter, the foreign defendant's ability to unwind the judgment is largely dependent upon the plaintiff

(Continued on following page)

The lower court's decision also unintentionally creates an inappropriate distinction between domestic and foreign companies. The deterrent effect of domestic damage statutes applies with full force to domestic businesses. They must still abide by antitrust and consumer protection laws, or face the penalty. Foreign entities, however, may be able to seek relief in their home, or other foreign, jurisdictions. By creating a greater incentive for domestic companies to obey antitrust and consumer protection laws than foreign companies, the lower court's decision places domestic companies at a disadvantage.

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having assets in a foreign jurisdiction, either the one in which the clawback action would be filed or another that would recognize the clawback judgment. That a private plaintiff would have assets abroad, however, is quite likely in today's international economy. *See, e.g.*, Laura Bloodgood, *Inbound and Outbound U.S. Direct Investment with Leading Partner Countries*, United States International Trade Commission Journal of International Commerce and Economics, at 1 (Jun 2007) (in 2005, the United States direct investment abroad was $2.1 trillion; for years 2000-2005, annual growth of United States direct investment abroad has grown 9% annually); Marcella Meirelles Aurelio, *Going Global The Pattern of U S Investment Abroad*, Economic Review, at 5 (3d Quarter 2006) ("the share of U.S. investments allocated to foreign assets . [was] 89 percent in 2005"). Even the *amici* states have funds invested where they may come under the jurisdiction of a foreign country's courts. *See, e.g.*, New Hampshire Center for Public Policy Studies, *Public Pension Predicament· New Hampshire's Retirement System*, at 11-12 (September 2007) (in 2006, the New Hampshire Retirement System holdings included 16% non-domestic common stock and 4% non-domestic fixed income holdings).

C. The Enforcement of Damage Awards Protects the Economy and Consumer Welfare.

Multiple damages awards protect the economy and the consumer by ensuring the violator does not profit from violations of antitrust or consumer protection laws and by deterring would-be violators. If a would-be violator does not face liability in some multiple of the harm that the would-be violator contemplates causing, *the would-be violator may* determine that the violation, even if detected, is economically advantageous. Faced with potential liability for a multiple of the actual damages caused, however, the would-be violator is less likely to view a violation as economically advantageous. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1033 (April 1986) ("If measured damages understate the total injury, potential violators will be underdeterred.").

Further, despite the vigilance of the Attorneys General and interested parties, not all violations are discovered and result in liability. Thus, the penalty must have an added "bite" to deter would-be violators from playing the averages. *See* Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, 1043-46 (West 2002) ("Unless the damages multiple is increased . . . , the level of deterrence will be reduced."); Richard Posner, *Economic Analysis of Law* § 7.2, at 223-30 (4th ed. 1992) (treble

damages are necessary to counteract the possibility of escaping detection); Salop & White, *supra*, at 1033 ("[E]ven if defendants were liable for all the harms their conduct caused, they would discount their future liability accordingly if they perceived that they would be sued only ten percent of the time. The result would be underdeterrence of violators.").

Moreover, the *amici* states recognize the need to compensate victims of such schemes. Here, the trial court found that the Respondents intentionally and illegally caused harm to a U.S. company that had to close its U.S. manufacturing facilities. Under the appellate court's ruling, Goss would not be able to retain the damages awarded for the Respondents' wrongful actions and, instead, Goss faces paying "back" the Respondents millions of dollars. In this situation, not only does the victim lose its recovery, but individual citizens pay the price as well when U.S. corporations cannot rebuild after being harmed by illegal activity.

II. A DOMESTIC COURT MUST BE ABLE TO PREVENT THE PARTIES BEFORE IT FROM UNDERMINING ITS JUDGMENT.

The decision below also attacks the finality of judgments. Litigants should be bound by a court's decision after they have had a full chance to present their case and have exhausted their appeal rights, as the Respondents did in this case. That disputes have a definite end is imperative to the rule of law. *See*

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) ("[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties . . . ") (quoting *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-526 (1931)). Twenty-five years ago, this Court reiterated the long-standing, universal need for the entire dispute between two parties to end when final judgment issues:

> what we said with respect to this doctrine more than eighty years ago is still true today; it ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals." *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897).

Nevada v United States, 463 U S. 110, 129 (1983).

Yet, under the decision below, a foreign company may continue to litigate a case in a foreign jurisdiction, even after submitting to the final judgment of the U.S. court, and the court is powerless to stop the company. Without the ability to order a litigant not to

attack a final judgment, the court's status as the final arbiter of disputes is eviscerated. A U.S. litigant will always be uncertain as to whether a final judgment means litigation with a foreign corporation has come to an end, or even if a final judgment has any meaning.

CONCLUSION

For the forgoing reasons, the *amici* states request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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December 2007

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5-23-08

No. 07-618

In the Supreme Court of the United States

GOSS INTERNATIONAL CORPORATION, PETITIONER

v.

TOKYO KIKAI SEISAKUSHO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the satisfaction of a money judgment divests a federal district court of subject matter jurisdiction to maintain an antisuit injunction designed to prevent the losing party from seeking to reverse the results of that judgment.

2. Whether the court of appeals erred in concluding that a foreign antisuit injunction was not warranted in the circumstances of this case.

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In the Supreme Court of the United States

No. 07-618

GOSS INTERNATIONAL CORPORATION, PETITIONER

v.

TOKYO KIKAI SEISAKUSHO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner is a United States corporation that manufactures printing presses and related equipment. Respondents are a Japanese corporation and its United States subsidiary. Pet. App. 87a, 89a.

In 2000, petitioner sued respondents under Title VIII of the Revenue Act of 1916 (1916 Act), ch. 463, 39 Stat. 798 (repealed 2004), which at the time created a private cause of action against parties who unlawfully "dumped" imported goods into the United States. On December 3, 2003, a jury found for petitioner and awarded $10,539,949 in damages, which the district

court trebled as provided in the 1916 Act. The final judgment, including costs and attorney's fees, exceeded $35 million. Pet. App. 4a-5a. That judgment was affirmed on appeal, *id.* at 87a-126a, and this Court denied certiorari. No. 05-1358 (June 5, 2006).

2. The United States is a member of the World Trade Organization (WTO), an international organization that administers certain trade agreements (collectively, WTO Agreement) and handles disputes between WTO Members arising out of the WTO Agreement. Japan and the European Communities (EC) are also Members of the WTO. Pet. App. 5a n.3.

In November 1998, the EC asked the WTO's Dispute Settlement Body (DSB) to convene a dispute settlement panel to consider whether the 1916 Act was inconsistent with the WTO Agreement. Japan made a similar request, and the DSB established panels to review the complaints. Pet. App. 5a n.3.

Both dispute settlement panels concluded that the 1916 Act was inconsistent with the WTO Agreement and that benefits accruing to the EC and Japan under that Agreement had been nullified or impaired by the United States, and recommended that the DSB request that the United States "bring the 1916 Act into conformity with its obligations under the WTO Agreement." Pet. App. 5a n.3. The panel considering Japan's complaint also "suggest[ed] that one way for the United States to" do so "would be to repeal the 1916 Act." Panel Report, *United States—Anti-Dumping Act of 1916*, ¶ 6.292, WT/DS162/R (May 29, 2000). The United States appealed the panels' reports to the WTO Appellate Body, which upheld the panels' determinations. Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28,

2000). On September 26, 2000, the DSB adopted the Appellate Body report and the panel reports as upheld by it. Dispute Settlement Body Action, *United States—Anti-Dumping Act of 1916*, WT/DS136/8, WT/DS162/11 (Oct. 2, 2000).

Legislation that would have repealed the 1916 Act and terminated cases pending under it was introduced on December 20, 2001, but not enacted. H.R. 3557, 107th Cong., 1st. Sess. On January 7, 2002, the EC and Japan separately requested WTO authorization to suspend concessions in order to enact their own legislation mirroring the 1916 Act with respect to imports from the United States. Recourse by the European Communities to Article 22.2 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS136/15 (Jan. 11, 2002); Recourse by Japan to Article 22.2 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS161/18 (Jan. 10, 2002). The United States objected to those proposals, and they were referred to arbitration. H.R. Rep. No. 415, 108th Cong., 2d Sess. 5 (2003) (*House Report*). On March 4, 2002, both arbitrators agreed to suspend arbitration pending efforts to resolve the disputes. Arbitrator Communication, *United States—Anti-Dumping Act of 1916*, WT/DS162/21 (Japan); Arbitrator Communication, *United States—Anti-Dumping Act of 1916*, WT/DS136/18 (EC). Legislation that would have repealed the 1916 Act and terminated cases pending under it was introduced on April 23, 2002, S. 2224, 107th Cong., 2d Sess., and on May 23, 2003, S. 1155, 108th Cong., 1st. Sess., but neither bill was enacted.

In September 2003, the EC requested resumption of arbitration regarding its request to suspend concessions. Arbitrators Communication, *United States—Anti-Dumping Act of 1916*, WT/DS136/19 (Sept. 29,

2003). In December 2003, the European Union (EU) approved a regulation banning the recognition and enforcement in EU countries of judgments rendered under the 1916 Act, and authorizing EU-based companies and citizens to claim damages for penalties assessed under the 1916 Act. *House Report* 5. On February 24, 2004, the arbitrators in the EC proceeding approved the suspension by the EC of concessions to the United States, but only in an amount equal to the total of any final judgments for, and settlements of, claims under the 1916 Act. Arbitrators Decision, *United States—Anti-Dumping Act (Original Complaint by the European Communities)*, ¶¶ 8.1, 8.2, WT/DS136/ARB. At that time, the 1916 Act remained in force. Unlike the EC, Japan never reactivated its separate WTO arbitration proceeding.[1]

On December 3, 2004, the President signed legislation repealing the 1916 Act. Miscellaneous Trade and Technical Corrections Act of 2004 (2004 Act), Pub. L. No. 108-429, § 2006(a), 118 Stat. 2597. The 2004 Act expressly provides that the repeal "shall not affect any action * * * that was commenced before the date of the enactment of this Act and is pending on such date." § 2006(b), 118 Stat. 2597.[2] A committee report prepared

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[1] The court of appeals' opinion mistakenly states that Japan also reactivated its separate WTO proceedings, and could be read to suggest (incorrectly) that the February 2004 decision was issued in connection with the Japanese proceeding as well as the EC proceeding. Pet. App. 6a n.3.

[2] The United States made no "repeated promises" (Br. in Opp. 6) that any repeal of the 1916 Act would cover this case. The document partially quoted on page 6 of the brief in opposition states that "[t]he representative of the United States" had reported that "the proposed legislation H.R. 3557 had been introduced in the US Congress which would repeal the 1916 Act and provide that no judgments pursuant to the actions under such Act shall be entered on or after 26 September

in connection with the 2004 Act expressly references this litigation—which it describes as the only "pending case brought under the Antidumping Act of 1916"—and notes that the jury had reached its verdict two months before the report was released. *House Report* 2 n.2.

The House Report states that "[s]everal factors strongly favor[ed]" a prospective-only repeal of the 1916 Act. *House Report* 5. It explains that "WTO decisions are not self-executing," and that "[a]utomatic adherence to WTO decisions undermines the legislative prerogatives of Congress and the sovereignty of the United States." *Ibid.* The House Report further notes that "both the Administration and Congress have consistently taken the position that retroactive repeal is not necessary to ensure compliance with our WTO obligations in all cases, particularly those pertaining to U.S. trade remedy laws." *Ibid.* Accordingly, because "the justification for repealing the 1916 Act [was] to bring the United States into compliance with its present WTO obligations," the House Report states that "conforming legislation should not extend to retroactive repeal." *Ibid.*; see *id.* at 17 n.19 (dissenting views) (stating that "[r]etroactive repeal is not required by WTO practice or pre-

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2000." Meeting Minutes, *Dispute Settlement Body, 8 March 2002*, ¶ 8, WT/DSB/M/121 (Apr. 3, 2002). That statement was an accurate description of the relevant bill. The minutes also state that "[t]he United States was continuing to work with the EC to find a mutually satisfactory solution to this dispute," *ibid.*, but there is no indication that the United States "promise[d]" that any legislation would cover this case. The document cited on page 18 of the brief in opposition quotes a joint communication stating accurately that "a proposal to repeal the 1916 Act and to terminate cases pending under the Act is currently being examined by the US Congress." Arbitrator Communication, *United States—Anti-Dumping Act of 1916*, WT/DS162/21 (Mar. 4, 2002).

cedent, and it has been argued that it would set a bad precedent for other WTO disputes").

3. On December 8, 2004, the Japanese legislature enacted a law whose title the lower courts translated as "The Special Measures Law concerning the Obligation to Return Profits Obtained pursuant to the Antidumping Act of 1916 of the United States, etc., Law No. 162, 2004" (Special Measures Law). Pet. App. 3a, 63a.[3] Article 6 of the Special Measures Law expressly provides that any final judgment entered in a foreign court under the 1916 Act "shall," depending on the translation, "be invalid," Pet. 4, or "not have any effect," Resp. C.A. App. 78. The Special Measures Law further provides that a party that obtains a final judgment under the 1916 Act against a Japanese national "shall reimburse such benefits with interest" and must also "indemnify" the Japanese party's attorney's fees in the United States proceedings. Pet. 3; see Resp. C.A. App. 77. Finally, the Special Measures Law imposes joint and several liability on any parent or wholly owned subsidiary of the party that obtained the judgment under the 1916 Act. Pet. 3-4; Resp. C.A. App. 77.

4. a. Respondents agreed not to file an action under the Special Measures Law until their appeals from the underlying merits judgment were exhausted, and to give petitioner 14 days' notice before doing so. Respondents gave the required notice on June 5, 2006, the same day this Court denied their petition for a writ of certiorari. In response, petitioner sought injunctive relief barring respondents from enforcing the Special Measures Law. Pet. App. 64a-65a.

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[3] The parties were unable to agree on an English translation of the Special Measures Law, Pet. 3 n.1, and the district court made no findings regarding the matter.

b. The district court entered a preliminary injunction barring respondents or "anyone acting in concert with them * * * from * * * assert[ing] or pursu[ing] any rights or remedies granted under the Japanese Special Measures Law." Pet. App. 84a. The court described it as "settled * * * that a foreign anti-suit injunction is only appropriate if the foreign litigation involves the same issues and parties as the federal action and if the federal action is dispositive of the foreign litigation." *Id.* at 74a. The district court found that "threshold" requirement satisfied because "the sole basis for [petitioner's] liability under the Japanese Special Measures Law is [petitioner's] receipt of damages awarded by this court." *Id.* at 74a-75a.

The district court next observed that "there is presently a circuit split" concerning "how much weight the court should give to considerations of international comity" before entering a foreign antisuit injunction. Pet. App. 75a. The court found it unnecessary to resolve that question, because it concluded that petitioner had "met its burden" under any of the existing standards. *Id.* at 76a. The court stated that "[e]ven among those courts that afford international comity the greatest respect, it is settled that considerations of comity have diminished force when, as here, one court has already reached judgment." *Ibid.* It also described respondents' intent to invoke the Special Measures Law as "a direct attack on this Court's judgment in favor of [petitioner] and a frontal assault on the jurisdiction of this court," because the "sole purpose" of such a suit would be to "undo six years of federal court litigation." *Id.* at 78a (internal quotation marks and citation omitted). The district court acknowledged that an injunction "would be deeply offensive to the Japanese government" and "may have international

repercussions." *Id.* at 78a-79a. But it determined that an injunction was "consistent with the decisions of the legislative and executive branches of the United States," which had "deliberately chose[n]" to make the repeal of the 1916 Act purely prospective and had done so despite knowing that the Japanese government considered the judgment in this case to be "in violation of the United States' obligations as a member of the [WTO]." *Id.* at 79a.

c. After the district court entered the preliminary injunction, respondents paid the underlying judgment, and the district court entered a satisfaction of judgment. Shortly thereafter, respondents appealed. Pet. App. 3a.

5. Citing "changed circumstances since the district court entered its preliminary injunction," Pet. App. 3a, the court of appeals vacated the preliminary injunction and remanded with instructions to dismiss petitioner's request for injunctive relief, *id.* at 1a-29a. The court first endorsed "the 'conservative approach' under which a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity." *Id.* at 8a.

The court of appeals determined that "[t]he case before us does not fit within the category of cases in which foreign antisuit injunctions have been considered." Pet. App. 19a-20a. The court "[f]irst" concluded that neither the All Writs Act, 28 U.S.C. 1651(a), nor the doctrine of ancillary jurisdiction "provides the district court with a separate source of jurisdiction to enjoin [respondents] under these circumstances." Pet. App. 20a, 22a. The Eighth Circuit noted that "the judgment is now rendered, paid, and satisfied," and that "[n]o pending litiga-

tion, other than this appeal, remains in the United States courts." *Id.* at 22a. The court also stated that "the request for injunctive relief is not for the prevention of interdictory jurisdiction by Japanese courts," and that "United States courts are being asked to prevent [petitioner] from seeking a remedy available solely in Japan." *Ibid.*

The court of appeals' "[s]econd" determination was that "once one court reaches a final judgment, the role of comity for antisuit injunction purposes essentially is moot because there is no longer tension with the foreign court over *concurrent* jurisdiction." Pet. App. 22a. Instead, "the doctrine of res judicata should apply as a defense to further litigation of the same issues." *Ibid.* The court of appeals reasoned that in this case "[t]he issues previously decided below * * * are different from the issues sought to be litigated in the foreign jurisdiction," because respondents seek "to litigate in Japan a cause of action solely available in Japan and not previously litigated in the antidumping litigation." *Id.* at 23a.

The court of appeals' "[t]hird" conclusion was that the district court had erred in assessing the impact of respondents' proposed suit on United States public policy. Pet. App. 23a. It "disagree[d] with" the district court's view that Congress's decision to repeal the 1916 Act in a prospective-only fashion "may play a role" in that determination, observing that the *House Report* indicates that Congress was aware of the "blocking" regulation that had already been enacted by the EU at the time of the repeal. *Id.* at 23a-24a. It also concluded that the district court had "placed too much emphasis on the impact of the Special Measures Law," noting that petitioner "received the only judgment ever granted under"

the "now-defunct 1916 Act," and opined that "the United States representative to the WTO may seek to enforce provisions of the WTO Agreement to prevent [respondents] from enforcing the Special Measures Law." *Id.* at 24a.

The court of appeals was "profoundly aware" that a judgment under the Special Measures law "would effectively nullify the remedy [petitioner] legitimately procured in the United States courts," but stated that such a result "does not threaten United States jurisdiction or any current United States policy." Pet. App. 25a. The court acknowledged that the Special Measures Law could itself "be regarded as an affront to the laws and judicial rules of the United States," *id.* at 26a, but concluded that "[a]ny response by the United States * * * must come through authorized representatives of the United States Executive or Legislative Branches," *id.* at 27a.

6. Following the court of appeals' decision, respondents commenced an action under the Special Measures Law in the Japanese courts against petitioner and its Japanese subsidiary. Pet. 11.

DISCUSSION

The court of appeals' analysis was flawed in several respects. Most fundamentally, the court erred in concluding that an action under the Special Measures Law would not involve the same issues that were previously resolved in the now-final federal court litigation. And if the court of appeals' decision is properly interpreted as holding that the satisfaction of a money judgment divests a district court of subject matter jurisdiction to maintain an antisuit injunction *regardless* of whether the second suit would involve the same issues as the first

one, it erred in that respect as well. Finally, the court of appeals erred in its comity analysis. It erroneously assessed the significance of Congress's decision to repeal the 1916 Act—and to do so in a prospective-only manner—for purposes of determining whether an action under the Special Measures Law would be inconsistent with United States public policy.

On balance, however, further review is not warranted. This case involves an unusual set of circumstances that are unlikely ever to recur, and the central errors in the court of appeals' analysis involve threshold issues that are, at present, unique to this particular case. As a result, this case presents a less-than-ideal vehicle for any broad consideration of the standards that federal courts should use in determining whether to enjoin a party from pursuing litigation in a foreign tribunal. Finally, although the Eighth Circuit's jurisdictional holding may conflict with the Second Circuit's analysis in *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2007), petition for cert. pending, No. 07-619 (filed Nov. 8, 2007) (*Pertamina*),[4] the scope of any conflict is narrow and uncertain and involves an issue that does not appear to arise frequently.

A. The Court Of Appeals' Analysis Was Erroneous In Several Respects

1. As the district court explained, even courts of appeals that disagree about the role and significance of international comity in determining whether a foreign antisuit injunction should be issued generally agree that a "threshold question" is whether "the foreign litigation

[4] Subsequent citations will be to the appendix to the petition for a writ of certiorari in *Pertamina* (*Pertamina* Pet. App.).

involves the same issues and parties as the federal action." Pet. App. 74a-75a (citing cases); see *Pertamina* Pet. App. 39a-40a; cf. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988) (stating that a federal court may enjoin state court litigation "of an issue that previously was presented to and decided by the federal court"). In reversing the district court's grant of preliminary injunctive relief, the court of appeals appears to have relied heavily on its conclusion that "[t]he issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction." Pet. App. 23a. That case-specific conclusion is erroneous.

The court of appeals correctly observed that the "cause of action" that respondents wish to litigate, as well as the "remedy" they seek, are available only in Japan. Pet. App. 22a-23a. It does not necessarily follow, however, that the two cases do not involve the same "issues" in the relevant sense. The fundamental issues resolved in the completed United States proceedings were (1) whether petitioner was entitled to be compensated for respondents' conduct in allegedly "dumping" printing-press equipment in the United States, and (2) if so, the amount of such compensation. The final judgment in that litigation conclusively resolved those issues in favor of petitioner. The litigation commenced by respondents in Japan under the Special Measures Law effectively seeks to relitigate those issues, albeit under Japanese law rather than United States law, in order to achieve a different (and directly contrary) result.

It is true that an action under the Special Measures Law would not permit respondents to relitigate the underlying factual questions, or whether governing United States law imposed liability under such circumstances.

Pet. App. 23a. But that is because the Special Measures Law makes the very existence of a final satisfied judgment under the 1916 Act the *basis* for imposing liability in the amount of the United States judgment. Pet. 3; Resp. C.A. App. 77. Accordingly, the Special Measures Law represents an even more direct attack on a final federal judgment than would a mere attempt to relitigate the underlying factual matters. The district court was therefore correct in concluding as a threshold matter that an antisuit injunction was a potentially available remedy. See *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) (stating that a federal court retains authority to "preserve the fruits and advantages of a judgment or decree rendered therein").

2. The scope of the court of appeals' holding regarding a federal court's power to maintain an antisuit injunction following satisfaction of an underlying judgment is unclear. There is language in the court's opinion that could be viewed as limiting its holding to situations in which the issues to be litigated, or the remedies that would be sought, in the second proceeding are different from those in the earlier proceeding. Thus, the court of appeals noted that "United States courts are being asked to prevent [respondents] from seeking a remedy available solely in Japan," and quoted this Court's statement that it has "cautioned against the exercise of jurisdiction over proceedings that are 'entirely new and original,' or where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree." Pet. App. 22a (quoting *Peacock* v. *Thomas*, 516 U.S. 349, 358 (1996) (brackets in original; citations omitted)). As discussed, the court then concluded (albeit erroneously) that the issues decided in the original federal action "are different from the issues sought to be litigated in the

foreign jurisdiction." *Id.* at 23a. And the court emphasized that its jurisdictional holding applied under "these circumstances" and "the facts of this case." *Id.* at 22a, 29a.

On the other hand, the court of appeals' decision can also plausibly be read as stating that a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and the judgment has been fully satisfied. The court began the relevant discussion by stating that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment," Pet. App. 21a, and emphasized that "the judgment now is rendered, paid, and satisfied," and that "[n]o pending litigation, other than this appeal, remains in the United States courts," *id.* at 22a. The court of appeals determined that it "need not decide whether the district court abused its discretion in issuing the preliminary antisuit injunction," but the only "changed" circumstance it referenced was its view that "there is no longer an outstanding judgment to protect." *Id.* at 28a. Finally, although the court of appeals "reach[ed] no categorical conclusion regarding the propriety of the issuance of an antisuit injunction in all cases involving the preservation of a judgment," the reason it gave for not doing so was because "there are cases where the satisfaction of judgment is not * * * solely the payment of a money judgment." *Id.* at 29a n.9.

To the extent that the court of appeals' jurisdictional holding is dependent upon the court's conclusion that the issues to be litigated in the Japanese proceeding are not the same as those that were previously litigated in the United States, that holding is flawed for the reasons already explained. See pp. 12-13, *supra*. And if the court of appeals held that a federal court lacks jurisdic-

tion to maintain an antisuit injunction in *any* situation once a purely money judgment has been fully satisfied, that holding would be erroneous for the reasons explained in the government's brief in *Pertamina*. Gov't Amicus Br. at 10-13, *Pertamina*, *supra* (No. 07-619). Moreover, this case would be an apt illustration for why such a categorical approach would be incorrect. In this case satisfaction of the judgment in the United States court was a condition precedent for the Japanese cause of action designed to countermand the effect of the United States proceeding. In these circumstances, treating satisfaction of the judgment as precluding an antisuit injunction ignores reality.

3. The court of appeals also erred in declining to give any weight in its public-policy analysis to "Congress's decision to repeal the 1916 Act prospectively, rather than retroactively." Pet. App. 23a. To be sure, Congress' decision to repeal the 1916 Act was "clearly [a] response to the WTO proceedings." *Ibid.* But neither that fact, nor the fact that the authors of the House Report were aware of the "blocking" regulation that had already been issued by the EU, *id.* at 24a, nor the fact that petitioner received the only judgment ever granted under the 1916 Act, *ibid.*, nor the existence of potential diplomatic avenues for reacting to the Special Measures Law, *id.* at 24a, 27a, is dispositive of the comity question here.

Subject to the constraints imposed by the Constitution, the public laws enacted by Congress embody, by definition, the public policy of the United States. The 1916 Act was a validly enacted federal law. And when Congress repealed that law in 2004, it made an express determination that the repeal would not apply to cases, including this one, that had been filed before the repeal.

See pp. 4-6, *supra*. It is the position of the United States that the prospective repeal of the 1916 Act brought the United States into conformity with the DSB's recommendations and rulings in the disputes with Japan and the EC over the 1916 Act. The court of appeals therefore erred in failing to recognize that Congress's decision to repeal the 1916 Act in a manner that preserved the judgment in this case is *itself* "United States policy" entitled to "play a role in the decision to grant a foreign antisuit injunction." Pet. App. 23a. Moreover, once Congress's express intent to give the repeal only prospective effect is recognized, the fact that this was the only pending case of which Congress was aware strengthens, rather than undermines, the case for an injunction.

Relatedly, the court of appeals also erred in giving seemingly dispositive weight to its view that "international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures Law." Pet. App. 24a. As a law specifically designed to overturn a final judgment entered by a court that clearly possessed jurisdiction and was implementing the law of its nation with respect to conduct and harm occurring within the territorial jurisdiction of that nation, the Special Measures Law is itself in considerable tension with general notions of international comity, and thus should not have received full weight in the comity analysis. See *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 931, 937 (D.C. Cir. 1984).

B. Further Review Is Not Warranted

For the reasons explained above, the court of appeals' analysis was flawed in several respects. On bal-

ance, however, the unique and case-specific nature of the dispute counsels against further review.

1. The first question presented involves at most a narrow issue: whether satisfaction of a money judgment divests a district court of jurisdiction to maintain an antisuit injunction. As explained (see pp. 13-14, *supra*), it is unclear whether the court of appeals' jurisdictional holding depends on its erroneous view that the issues in the second proceeding differ from those in the completed federal proceeding. If so, the decision below essentially amounts to a flawed case-specific determination that the Japanese lawsuit differs in material respects from the completed United States adjudication, a determination that would not conflict with the Second Circuit's jurisdictional holding in *Pertamina*, which is expressly limited to injunctions barring "relitigat[ion of] issues in a non-federal forum that were already decided in federal court." *Pertamina* Pet. App. 38a. On the other hand, if the Eighth Circuit's decision holds that a federal court lacks jurisdiction to maintain an antisuit injunction whenever the underlying judgment was solely for money and has been fully satisfied, there would be a direct conflict between that decision and *Pertamina*. See *ibid.* (holding that "federal courts have continuing jurisdiction" to "enjoin a party properly before them from relitigating issues in a non-federal forum," "even after a judgment has been satisfied").

In any event, the potential conflict between *Pertamina* and the decision below does not merit further review at this time. Any conflict is of recent vintage and involves only two circuits. The parties have cited no other appellate decisions addressing the narrow question of ancillary jurisdiction at issue here, which suggests that the issue arises only infrequently. Moreover,

it remains to be seen whether the Eighth Circuit will apply the jurisdictional rule announced in this case even when, unlike here, the court concludes that the action to be enjoined constitutes an attempted re-litigation of the earlier suit. And the Eighth Circuit's holding that the issues decided in the federal litigation "are different from the issues sought to be litigated in the foreign jurisdiction" (Pet. App. 23a), while quite erroneous, is necessarily case-specific and does not itself warrant further review.

2. a. The second question presented involves the standards that federal courts should use in determining whether to enjoin parties from litigating in foreign courts. Although the courts of appeals have enunciated different verbal formulations of the proper test, it appears that all of them give weight to comity concerns, and it is not clear that the different formulations have actually produced different results in cases with comparable facts. See, *e.g.*, *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 446 F.3d 984, 995 (9th Cir. 2006) (stating that although "[t]here may be different views among circuits as to the relative importance to be given to comity in deciding whether to file an anti-suit injunction," it was unnecessary to "express [an] opinion on these possible differences" because "in this case, an anti-suit injunction would be appropriate under any test"); *Philips Med. Sys. Int'l B.V.* v. *Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (declining to "make a definitive choice" regarding the proper standard "or even decide whether the differences between the standards are more than verbal, that is, whether they ever dictate different outcomes," because an injunction was warranted "even under the more demanding standard").

Even assuming that the different formulations will produce materially different outcomes, moreover, this case does not appear to be a suitable vehicle for choosing among them. The unusual procedural and factual background of this case presents issues that are unlikely ever to recur. The Special Measures Law is expressly limited to judgments obtained against Japanese nationals under the 1916 Act, and the United States is not aware of any remaining cases pending under the 1916 Act. Before this case, no court had been asked to consider the weight of United States public policy in protecting the effectiveness of judgments obtained under the 1916 Act, and no court will ever be asked to do so again. In addition, because the court of appeals' analysis of the comity issues was so closely tied to the circumstances of this particular case—including the court's erroneous threshold determination (Pet. App. 23a) that a suit under the Special Measures Law would present different issues from those resolved in the already-completed federal proceeding, and the court's misplaced reliance (*id.* at 23a-25a) on the congressional repeal of the 1916 Act—it is questionable whether this Court's review would generate a precedent of general significance.

b. Petitioner suggests (Pet. 26-28) that further review is necessary because of the existence of other clawback statutes and the prospect that foreign governments could enact others. The United Kingdom has a clawback statute that provides recovery for the noncompensatory portion of any antitrust award, Protection of Trading Interests Act, 1980, c. 11, § 6.2 (1980), and other nations have enacted clawback legislation with respect to certain judgments obtained under United States antitrust laws as well. See Foreign Extraterritorial Measures Act,

R.S.C., ch. F-29, §§ 8-9 (Can. 1985); Foreign Proceedings (Excess of Jurisdiction) Act, 1984, No. 3, § 10 (Austl.). Foreign governments have also enacted clawback statutes aimed at laws such as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (22 U.S.C. 6021 *et seq.*), and the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541. See, *e.g.*, Council Regulation 2271/96, art. 6, 1996 O.J. (L 309) 39 (EU).

Notwithstanding the existence of those statutes, the United States is unaware of any other application of a foreign clawback statute against the United States in recent years, and it is not clear to what extent such cases will arise in the future. Moreover, clawback statutes pose sensitive diplomatic, as well as legal, questions. See United States Embassy, London, England, Diplomatic Note No. 56, 21 I.L.M. 840, 843 (Nov. 9, 1979) (stating that the then-proposed Protection of Trading Interests Act "raises serious questions under the very principles of international law and comity to which Her Majesty's Government is committed"). In addition, the fact that the Special Measures Law is a response to a United States law that has been repealed, and that the WTO found to be inconsistent with the WTO Agreement, may diminish the extent to which further review here would likely provide a useful precedent for future disputes. Accordingly, it would be preferable for this Court to await a case involving a clawback statute aimed at a federal law in which the United States retains an ongoing enforcement interest.

c. Petitioner asserts that the court of appeals held that "because the judgment was final and satisfied, concerns about protecting the judgment were insufficient to outweigh comity," and that this holding "creates addi-

tional conflict among the circuits over the weight to be accorded to comity once a final judgment is entered in the United States." Pet. 24-25 (citing Pet. App. 26a). Petitioner is correct that the lower courts have generally concluded that international "comity carries less weight" once a court has rendered a final judgment. Pet. 24. It is far from clear, however, that the Eighth Circuit enunciated a rule of law that conflicts with the decisions of other courts in that respect.

Petitioner does not identify the language in the opinion below that gives rise to the alleged conflict, but may be referring to the court of appeals' statement that because "the present case involves no pending litigation between the parties * * * in the United States" an antisuit injunction "is beyond our limited jurisdiction and contrary to principles of comity." Pet. App. 26a. That language does not clearly hold that the Eighth Circuit accords more weight to international comity in the final-judgment context. To the contrary, the court earlier stated that "once one court reaches a final judgment, the role of comity for antisuit injunction purposes essentially is *moot*," and that, in such circumstances, "the doctrine of res judicata should apply as a defense to further litigation of the same issues." *Id.* at 22a (emphasis added). Whatever the merit of that statement, it is difficult to reconcile with petitioner's characterization of the court's holding. Thus, the court's reliance on the absence of pending litigation is perhaps best understood as a reflection of its earlier (erroneous) conclusion that preclusion principles "are inapplicable here" because "[t]he issues previously decided below in the district court are different from the issues sought to be litigated in the foreign litigation." *Id.* at 23a. For that reason, the court below did not clearly reject the "settled" rule

that "considerations of comity have diminished force when, as here, one court has already reached final judgment." Pet. App. 76a.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2008

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[5] If the Court nonetheless concludes that certiorari is warranted with respect to one or both of the questions presented, the government submits that this case would present a better vehicle than *Pertamina*. First, *Pertamina* has an extremely complicated procedural background involving arbitration, litigation in numerous foreign countries, and multiple decisions by two different courts of appeals, and it implicates the sovereign interests of at least four different jurisdictions. This case, in contrast, has a more straightforward procedural history, and principally involves only the United States and Japan. Second, the Second Circuit's decision in *Pertamina* is correct, whereas the analysis of the court below was erroneous in several respects.

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No. 07-618

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In the
Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. and TKS (USA), INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petitioner Goss submits this brief pursuant to Rule 15.8, in response to the brief *amicus curiae* filed by the Solicitor General. The Solicitor General agrees that the Eighth Circuit's decision was incorrect and rife with errors. He states (at 10-11) that the court of appeals "erred in concluding" that the clawback action in Japan "would not involve the same issues that were previously resolved" in the U.S. litigation, "erred" in concluding "that the satisfaction of a money judgment divests a district court of jurisdiction to maintain an antisuit injunction," "erred in its comity analysis," and "erroneously assessed the significance of Congress's decision" to preserve Goss's judgment when Congress prospectively repealed the 1916 Act. The Solicitor General agrees that TKS' clawback suit "seeks to relitigate" resolved issues "in order to achieve a different (and directly contrary) result" and that long-established and "controlling" precedent of this Court "make[s] clear that the district court possessed authority to restrain [TKS] from prosecuting another action that sought to nullify or evade its previous judgment," regardless of whether TKS had "satisf[ied] the district court's judgment." (S.G. Br. 12; S.G. Br. in *Pertamina*, No. 07-619, at 10-11.)

The Solicitor General acknowledges that this Court long ago decided that to strip courts of the power to protect their judgments would be "'a great defect in our Federal jurisprudence'" and a "'reproach upon the administration of justice.'" (S.G. Br in *Pertamina* 11, quoting *French*, 89 U.S. at 253). In addition, the Solicitor General recognizes that a "direct conflict" exists between the ruling below and the Second Circuit's "correct" decision in *Pertamina*, and that *Goss*,

with its "straightforward procedural history," would "present a better vehicle than *Pertamina*" to resolve that conflict. (S.G. Br. 17, 22 n.5.)

The Solicitor General also concedes that numerous foreign clawback statutes are now aimed at private judgments and the lower court's decision would leave federal courts powerless to prevent clawback actions. Nonetheless, the Solicitor General ultimately contends that the Court need not review the "quite erroneous" decision below because the issues arise "only infrequently" and the circuit split "is of recent vintage." (*Id.* 17.)

The Solicitor General's conclusion is untenable. The decision below is a dangerous precedent with widespread application, as attested by *amici* filings from States and prominent experts in legal procedure, and letters in support of certiorari from leading business organizations (*see* supplemental appendix, *infra*). The Eighth Circuit's decision satisfies all the traditional criteria for certiorari. It conflicts with this Court's decisions, conflicts with the law of other circuits, invites foreign countries to nullify Congressional policies, contradicts established principles of comity, and raises serious practical deterrents to international investment. And, because the need for foreign antisuit injunctions arises with frequency, the inability of federal courts to issue antisuit injunctions after satisfaction of judgment would impair the judiciary's authority to meaningfully adjudicate disputes involving foreign firms.

1. The Eighth Circuit's decision conflicts with this Court's precedent establishing the federal courts' power to protect their final judgments.

In his brief in *Pertamina* (*Karaha*), the Solicitor General recognizes that the Eighth Circuit's decision conflicts with decisions of this Court which establish that "the district court possessed authority to restrain petitioner from prosecuting another action that sought to nullify or evade its previous judgment." (S.G. Br. 10.) That conflict is worthy of this Court's review. *See* William H. Rehnquist, THE SUPREME COURT 234 (2001) ("[A]n important factor is the perception of one or more justices that the lower court decision may well be . . . an incorrect application of Supreme Court precedent.").

The Eighth and Second Circuits' disagreement may be of "recent vintage," but the precedent of *this* Court that the Eighth Circuit ignored is of long standing. *Dugas*, 300 U.S. at 415-22; *Dietzsch*, 103 U.S. at 497-98 (discussed in S.G. Br. in *Pertamina* 10-13.) Repeatedly, this Court has acted to ensure a uniform approach to jurisdictional issues, granting certiorari to resolve confusion regardless of the amount in dispute. *E.g.*, *Peacock*, 516 U.S. at 349 ($187,000 in dispute); *Kokkonen*, 511 U.S. at 375 (no money; return of a file); *Dugas*, 300 U.S. at 414 ($2,999 at stake); *Local Loan*, 292 U.S. at 234 ($300 wage assignment).

Moreover, it would be extraordinary for this Court to let pass a ruling that, as the Solicitor General concedes, flies in the face of a specific policy of the United States—reflected in an Act of Congress—to

preserve the particular judgment in this case. Just as that very deliberate decision by Congress "strengthens, rather than undermines, the case for an injunction" (S.G. Br. 16), it also strengthens the case for this Court's review.

2. The decision below conflicts with the Second Circuit's decision in *Pertamina*.

The Solicitor General acknowledges (at 14) that the Eighth Circuit's decision may properly be read to hold that a federal court lacks jurisdiction to protect money judgments once they have been satisfied and that this holding conflicts with the Second Circuit's decision in *Pertamina*. He recognizes that the current case is "an apt illustration" of the necessity for federal courts to maintain jurisdiction to protect their judgments, even after satisfaction. (*Id.* 15.) The Solicitor General nevertheless suggests that the Eighth Circuit's holding—while still wrong—might be read to be limited to situations in which "the issues to be litigated, or the remedies that would be sought, in the second proceeding are different from those in the earlier proceeding." (*Id.* 13.)

But as the Solicitor General correctly explains, the Japanese clawback statute renders the final judgment in this case "invalid" (or denies it "any effect"). The statute offers TKS "reimbursement" in Japan of the U.S. judgment and requires Goss to "indemnify" TKS for its litigation expenses. (*Id.* 6.) TKS' clawback action turns on the "existence of a final satisfied judgment" and is "designed to countermand the effect of the United States proceeding." (*Id.* 13, 14.) As the

Solicitor General concludes, the clawback is "an even more direct attack on a final judgment than would be a mere attempt to relitigate." (*Id.* 13.) Likewise, the Eighth Circuit understood that the clawback suit will "effectively nullify" the federal court's judgment. (App. 22a.) None of this is consistent with the suggestion that the issues to be litigated or remedies available were somehow different in the later proceeding.

The Eighth Circuit's opinion confirms that the ruling did not rest on differences between the U.S. and Japanese proceedings. The Eighth Circuit *approved* the district court's finding that the court had "ancillary enforcement jurisdiction to preserve the judgment" by issuing an antisuit injunction. (App. 28a.) The court of appeals carefully noted that its decision turned on the fact that "the jurisdictional circumstances and comity considerations . . . changed" after the district court issued its injunction: the money judgment was satisfied. (*Id.*) The Eighth Circuit explained its decision by reference to that change, not any difference between the actions.

The Second Circuit also understood that its decision in *Pertamina* conflicted with the *Goss* decision. The Second Circuit expressly considered and rejected the Eighth Circuit's reasoning. *Pertamina*, 500 F.3d at 128-29. And it relied upon the exact same language from *Riggs*—"the jurisdiction of a court is not exhausted by rendition of the judgment, but continues until the judgment shall be satisfied"—that the Eighth Circuit cited in reaching the opposite result. *Pertamina* leaves no doubt that the Second Circuit would have decided *Goss* differently. Such confusion on a fundamental issue of federal jurisdiction should

be resolved. And *Goss* presents the "better vehicle" for resolving the circuit split. (S.G. Br. 22 n.5.)

3. The Eighth Circuit's decision poses an immediate threat to the policies reflected in Congress' decision to authorize private enforcement of important federal laws.

Congress authorizes private actions (and treble damages) "precisely for the purpose of encouraging private challenges" to strengthen federal law enforcement. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Private enforcement also increases the chances that a violation will be detected. *See* II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 303d, (3d ed. 2007) ("public enforcement . . . is supplemented by private enforcement, which increases the likelihood that a violator will be found out, greatly enlarges the penalties, and thereby helps discourage illegal conduct."). As the Solicitor General explains, "Congress's decision to repeal the 1916 Act in a manner that preserved the judgment in this case is *itself* 'United States policy.'" (S.G. Br. 16.)

The Solicitor General correctly recognizes that numerous foreign nations already have clawback statutes aimed at nullifying judgments under U.S. statutes, including the antitrust laws, LIBERTAD, and the Iran and Libya Sanctions Act. (*Id.* 19-20.) The United Kingdom's clawback statute permits the clawback of all multiple damages awarded under *any* federal statute (not just the antitrust laws). *See* PTIA, 1980, c. 11, § 6 (U.K.). Canada's clawback statute allows clawback of *any* federal judgment the

Canadian Attorney General deems adverse to Canada's interests. *See* FEMA, R.S.C., ch. F-29, § 9 (1985), amended by 1996 R.S.C., ch. 28. (Can.).

The Eighth Circuit's decision provides no meaningful basis to distinguish the judgment in this case from any other private money judgment under federal law and thus poses an immediate threat to the finality of federal judgments and the authority of federal courts. First, the decision provides an easy-to-follow blueprint to foreign legislatures, inviting them to pass new clawback statutes aimed at nullifying U.S. judgments they dislike. Awaiting another case perhaps years from now would encourage foreign nations to pass more clawback statutes based upon the Eighth Circuit's roadmap. The Solicitor General has previously acknowledged that providing a roadmap for evasion of U.S. law is bad policy. *See* S.G. Pet. in *United States v. Eurodif S.A.*, Nos. 07-1059, -1078, at 16 (urging certiorari to close a "potentially gaping loophole" that future litigants could exploit).

Second, prior to the Eighth Circuit's decision, practitioners generally understood that federal courts would protect their final money judgments from foreign attack. Thus, defendants had little incentive to test existing foreign clawback statutes. Now, foreign defendants will certainly attempt to evade final money judgments through clawback suits. This will be a particular problem with regard to multiple damage judgments against defendants with operations in Great Britain and with regard to any antitrust judgment.

The *Goss* decision has been closely watched, both here and abroad. The leading antitrust treatise includes an extensive review of the ruling, pointing to it as one of the top three "Highlights of the 2008 Supplement." Areeda & Hovenkamp, *Antitrust Law*, ¶ 275 (2008 Supp.). The ABA's Antitrust Law Section discusses the lower court's decision in its newly published update. ABA Section of Antitrust Law, *2007 Annual Review of Antitrust Law Developments*, at 297-98 (2008). And, the case has received international attention. *E.g.*, *After Judgment Satisfied, Circuit Court Clears Impediment to Japanese Clawback Suit*, WTO Reporter (Sept. 4, 2007). Given widespread knowledge of this decision, practitioners across the Nation must advise foreign clients about the possibility of clawback relief from final judgments. And, foreign legislatures will exploit this gaping loophole in U.S. law.

The issue of whether federal courts must permit foreign lawsuits to impair federal judgments is a recurring one. Contrary to the Solicitor General's suggestion (at 17), federal courts frequently issue foreign antisuit injunctions, granting at least 14 since just 2005. *E.g.*, *Pertamina*, 500 F.3d at 119-30, *Int'l Equity Invs.*, 246 F. App'x at 80; *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64-65 (2d Cir. 2007); *E. & J. Gallo*, 446 F.3d at 989-95; *Triton Container*, 440 F.3d at 1137-38; *Software AG, Inc. v. Consist Software Solutions, Inc.*, No. 08 Civ. 389, 2008 WL 563449, at *20-25 (S.D.N.Y. Feb. 21, 2008); *Aprimo, Inc. v. Executive Computing Pty Ltd.*, No. 1:07-cv-1419, 2007 WL 4215987, at *1-3 (S.D. Ind. Nov. 21, 2007); *MasterCard Int'l Inc. v. Fed'n*

Internationale de Football Ass'n, No. 06 Civ 3036, 2007 WL 631312, at *6-10 (S.D.N.Y. Feb. 28, 2007); *Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 Civ. 13157, 2006 WL 3735657, at *5 (S.D.N.Y. Dec. 15, 2006); *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, Nos. 03 Civ. 4148(WHP), 04 Civ. 5732(WHP), 2006 WL 3327625, at *2-4 (S.D.N.Y. Nov. 16, 2006); *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876, 883-85 (N.D. Ill. 2006); *Suchodolski Assocs.*, 2006 WL 10886, at *2-3 (S.D.N.Y. Jan. 3, 2006) (first of two antisuit injunctions); *SG Avipro*, 2005 WL 1353955, at *2-3; *Zen-Noh*, 373 F. Supp. 2d at 648-53. At least four of these recent decisions—*Pertamina*, *Triton*, *MasterCard*, and *Zen-Noh*—involve the protection of a final federal judgment. The *Goss* decision creates confusion and inconsistency on an important and recurring issue where federal courts previously understood they had jurisdiction to protect their final judgments.

4. The Eighth Circuit's decision conflicts with this Court's and appellate courts' decisions on comity.

This Court has understood international comity to require "respect for the sovereignty of foreign nations on their own territory." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 408 (1990); *see Hartford Fire*, 509 U.S. at 798-99 (comity cannot override matters of domestic concern). As Chief Justice Marshall explained long ago, "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *The Schooner Exchange v.*

McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812). Thus, just as a person who "commits a crime in a foreign country . . . cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people," a foreign firm like TKS cannot evade the sanction for violating a U.S. statute within the United States. *Neely v. Henkel*, 180 U.S. 109, 123 (1901). The Eighth Circuit ignored this Court's teaching.

Even the Japanese Government has argued this principle to the Court:

> At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states.

Amicus Br. of the Gov't of Japan in *Empagran*, No. 03-724, at 6 (quoting J.L. Brierly, *The Law of Nations* at 162 (6th ed. 1963)). The Japanese Government's position is especially noteworthy because Japan initiated the current dispute when it passed a clawback statute to nullify the judgment here. The Japanese Government has also been deeply involved at all levels of this case. It appeared *amicus curiae* in the district court to oppose the antisuit injunction, in the appellate court to advocate overturning the underlying judgment and again to urge reversal of the district court's issuance of an antisuit injunction, and even before this Court to urge certiorari and reversal of the underlying judgment. Allowing Japan to successfully facilitate its nationals' nullification of

final judgments undermines federal judicial authority and sends a dangerous message to U.S. trading partners.

The Eighth Circuit's decision turns comity on its head. Other appellate courts have uniformly understood that once a court reaches final judgment, comity plays a diminished role in the decision to issue a foreign antisuit injunction to protect that judgment.[1] The Eighth Circuit, in contrast, rather than giving great weight to a final judgment finding a violation of law within the United States, held that once the case reached its conclusion "there is no longer an outstanding judgment to protect." (App. 28a.) This is particularly perverse because, as the Solicitor General explained, the clawback statute was "specifically designed to overturn a final judgment entered by a court that clearly possessed jurisdiction" and, thus, "is itself in considerable tension with general notions of international comity." (S.G. Br. 16.) This Court should resolve the circuit conflict by reaffirming that a final judgment is entitled to more—not less—protection than a concurrent lawsuit.

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[1] *E.g.*, *Pertamina*, 500 F.3d at 120; *Paramedics*, 369 F.3d at 655; *Mutual Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1324-25 (11th Cir. 2004); *Karaha*, 335 F.3d 357, 372 n.59 (5th Cir. 2003); *Silva Run*, 2002 WL 31907194, at *1; *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 131 (S.D.N.Y. 1997), *aff'd sub nom, Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998); *Allendale*, 10 F.3d at 433; *Gau Shan*, 956 F.2d at 1352; *Laker Airways*, 731 F.2d at 928 n.53.

5. The Eighth Circuit's decision is of great practical importance to American industry.

The possibility of foreign clawback suits chills American investment abroad. American businesses with foreign affiliates or investments are exposed to foreign clawback actions. American executives must now weigh this risk before expanding operations or investing in a foreign country.

As explained by Governor John Engler in a letter to the Solicitor General on behalf of the National Association of Manufacturers ("NAM"), the lower court's decision "jeopardize[s] investments that U.S. companies make abroad[,] . . . create[s] the potential for instability in our rules-based trading system and undermin[es] progress toward an open investment climate in markets around the world." (Supp. App. 2a.) Similarly, the Committee to Support U.S. Trade Laws ("CSUSTL") warned the Solicitor General on behalf of 99 of its member organizations (including U.S. businesses and labor unions) that the Eighth Circuit's decision "open[s] the door to further attacks from foreign governments on important but internationally unpopular aspects of our judicial system." (*Id.* 6a, 8a-11a.)

And, as both NAM and CUSUSTL also explain, the mere possibility of a clawback suit creates an unequal playing field in which foreign businesses do not have the same incentive to obey U.S. law as domestic companies. (*See also Amici* States' Br. 8.) If the Eighth Circuit's decision is allowed to stand, TKS will nullify a $40 million final judgment of the federal courts, based on TKS' intentional violation of U.S. law

that cost hundreds of U.S. manufacturing jobs. The example of TKS' successful evasion of federal law will certainly be noted by other foreign firms doing business in this country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2008

APPENDIX

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John Engler

President and CEO

May 5, 2008

Via Messenger

The Honorable Paul D. Clement
Solicitor General
United States Department of Justice
Fifth Floor
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd., et al.* (Case No. 07-618)

Dear Mr. Clement:

On behalf of the National Association of Manufacturers (NAM), I am writing regarding the Supreme Court's request for the views of the Solicitor General concerning the certiorari petition in Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd. (No. 07-618). This case has far-reaching implications for U.S. businesses operating at home and abroad.

The case involves a United States (U.S.) manufacturer that won a jury verdict in federal court against a Japanese competitor for violations of antidumping law. The verdict was upheld on appeal and the judgment was paid. That judgment is now being attacked through a retaliatory Japanese clawback statute, which I understand declares the U.S. judgment null and void and allows the losing defendant to sue in Japan to recover the full amount from the U.S. company or its wholly-owned Japanese subsidiary.

This is not an isolated issue. It involves the fundamental question of whether a federal court can protect its own final judgment against foreign actions that undercut legal claims that have been properly adjudicated and paid. Refusing to recognize such jurisdiction would jeopardize investments that U.S. companies make abroad.

The NAM strongly supports an open investment climate that enables U.S. companies to be internationally competitive. The NAM Board of Directors recently reiterated its support for reducing foreign barriers to U.S. investment and exports by approving a new policy that recognizes the importance of "basic principles of equitable treatment," including national treatment and most-favored-nation treatment for foreign investment. However, clawback statutes appear to contradict this policy by creating the potential for instability in our rules-based trading system and undermining progress toward an open investment climate in markets around the world.

U.S. companies seek a level playing field to compete on fair and nondiscriminatory terms in the global

market. Due to the potentially broad implications of this case on the integrity of our rules-based trading system and the importance of open investment, we urge your office to argue that the Supreme Court grant Goss' petition for Supreme Court review. Thank you for your consideration.

Sincerely,

/s/ John Engler

John Engler

JE/qr

cc: Thomas Hungar, Esq.

Toby Heytens, Esq.

COMMITTEE TO SUPPORT U.S. TRADE LAWS

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May 6, 2008

The Honorable Paul D. Clement
Solicitor General of the United States
United States Department of Justice
5th Floor
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Re: *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd., et al* (Case No. 07-618)

Dear Solicitor General Clement:

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), I am writing regarding the Supreme Court's request for the views of the Solicitor General concerning the certiorari petition in *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd.* (No. 07-618). CSUSTL's members include manufacturers, food producers, trade associations, labor unions and workers committed to preserving the integrity of U.S. trade laws. Our membership list is attached. We urge you to advise the Supreme Court to grant Goss' petition for Supreme Court review.

The case at issue involves a Japanese company, TKS, found by U.S. courts to have intentionally and illegally used predatory dumping with the express intent of harming the U.S. large newspaper press industry, including U.S. manufacturer Goss International. The verdict in favor of Goss was upheld on appeal and the judgment was paid. In a separate investigation, the Department of Commerce found that TKS committed fraud by submitting false and incomplete information and termed TKS' behavior "a uniquely egregious display of misconduct by a respondent in an antidumping proceeding."

Goss' federal court judgment is now being attacked by the Japanese government, which passed a retaliatory clawback statute. The statute declares the U.S. judgment null and void and allows TKS to recover the full amount of the judgment from Goss or its wholly-owned Japanese subsidiary.

The fundamental question in this case involves whether a federal court can defend its own final judgment against foreign actions that undercut legal claims that have been properly adjudicated and paid. Refusing to recognize such jurisdiction would undermine our rules-based international trading system and undermine the integrity of U.S. trade laws.

CSUSTL is committed to maintaining U.S. trade remedy laws as strong and viable remedial tools to address predatory and injurious dumping. When a foreign company does business in the United States, it must be subject to the same rules as a U.S. company, and it should not be allowed to avoid the consequences for violations of U.S. law by seeking retalia-

tory action in its home country. In this instance, Goss and its workers were injured by illegal trade practices, resulting in significant economic damage to Goss and the loss of many high paying, high skilled jobs in the United States. Goss followed the rules, using our trade laws to obtain relief and proving its case in court. In contrast, the Japanese producer TKS blatantly violated U.S. law and lied to the Department of Commerce to hide its actions and avoid paying duties. It did not like the result of the litigation, so it sought protection from the Japanese government in the form of a clawback statute to escape the consequences of its actions.

Goss International seeks a level playing field to compete on fair and nondiscriminatory terms in the global market. If TKS is allowed to clawback the damages that were legitimately awarded by a federal court, it would result in additional harm to Goss and its Japanese affiliate and unjustly reward TKS for its fraudulent activity. Such an outcome would undermine our rules-based trading system, represent a setback for U.S. trade remedy laws, and open the door to further attacks from foreign governments on important but internationally unpopular aspects of our judicial system.

For these reasons, we urge your office to advise the Supreme Court to grant Goss' petition for Supreme Court review. Thank you for your consideration.

Very truly yours,

/s/ David A. Hartquist
David A. Hartquist
Executive Director

cc: Thomas Hungar, Esq.
Toby Heytens, Esq.

The Committee to Support US Trade Laws (CSUSTL) and the following member organizations endorse the positions set forth in the attached document:

Advanced Micro Devices, Inc.
AFL-CIO
Allied Tube & Conduit
Amalgamated Sugar Company
American Coke & Coal Chemicals Institute
American Corn Growers Association
American Fiber Manufacturers Assn.
American Foundry Society
American Furniture Manufacturers Committee for Legal Trade
American Iron and Steel Institute
American Maritime Officers
American Textile Manufacturers Institute
American Yarn Spinners Association
Ameristeel Bright Bar
AMT-Association for Manufacturing Technology
Anvil International
Associated Industries of Massachusetts
Automotive Aftermarket Industry Association
Carmeuse Lime & Stone
Carpenter Technology Corporation
California Fresh Garlic Producers Association
California Cut Flower Commission
Candle-Lite Division of Lancaster Colony Corp.
Chicago Fire Brick Division of Allied Mineral Products, Inc.
China Currency Coalition
Cleveland-Cliffs, Inc.
Coalition for Fair Lumber Imports

Cold Finished Steel Bar Institute
Committee on Pipe & Tube Imports
Communications Workers of America
Copper & Brass Fabricators Council
Corey Steel Company
Crawfish Processors' Alliance
Dakota Resource Council
Fair Atlantic Salmon Trade
Falcon Foundry
Fleming, Chuck F. (North Dakota Agriculture Committee)
Floral Trade Council
Florida Farmers, Inc.
Florida Fruit & Vegetable Association
Florida Tomato Exchange
Flower Growers of Puget Sound
FMC Corporation
Forging Industry Association
Goodrich Corporation
Independent Cattlemen of Texas
Industrial Heating Equipment Association
Industrial Packaging Alliance of NAS
Int'l Brotherhood of Electrical Workers
JIT Terminal, Inc.
Johnson, Roger (North Dakota Agriculture Committee)
Kansas Cattlemen Association
Kuster, Louis (Farmer)
Lake Carriers' Association
Libbey, Inc.
LMP Steel & Wire Company
Lumi-lite Candle Co., Inc.
Manufacturers for Fair Trade
Micron

Milwaukee Wire
Missouri Stockgrowers' Association
Montana Cattlemen's Association
Municipal Castings Fair Trade Council
National Candle Association
National Cotton Council
National Farmers Organization
National Farmers Union
National Lime Association
National Textile Association
Nelsen Steel Company LP
Nevada Livestock Association
NewPage Corporation
New Process Steel
North Dakota Farmers for Profitable Agriculture
Nucor Corporation
PMC Specialties Group, Inc.
Polyethylene Retail Carrier Bag Committee
R-CALF United Stockgrowers of America
Safelite Glass Corp.
South Dakota Stockgrowers' Association
Southern Shrimp Alliance
Southern Tier Cement Committee
Soybean Producers of America
Specialty Steel Industry of North America
Steel Manufacturers Association
Stupp Bros. Bridge & Iron Company
Sunblest Mgmt. LLC
The Timken Company
Thoeny Farms, Inc.
Thompson Steel Company, Inc.
United Steelworkers
U.S. Beekeepers
U.S. Business & Industry Council

U.S. Durum Growers Association
Vaughn-Bassett Furniture Company
Village Farms
Ward Manufacturing, Inc.
Western Organization Resource Council
Wisconsin Paper Council

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No. 07-818

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. AND TKS (USA), INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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June 2, 2008

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INTRODUCTION

As might be expected in a case addressing the sole judgment resulting from a now-repealed statute, the United States confirms that each of petitioner's main contentions in favor of this Court's review is without merit. The Eighth and Second Circuits do not conflict over whether ancillary jurisdiction exists to support an antisuit injunction after payment of a money judgment, and no multi-circuit split exists regarding the treatment of international comity. Petitioner's claims of a conflict concerning the antisuit standard that applies to a foreign proceeding after entry of final U.S. judgment are, as the United States shows, simply imagined. And, the only practical implication of other nations' clawback statutes is that review here would potentially interfere with the conduct of our Nation's foreign policy. Finally, the United States does not mention that the proceedings in Japan have now been ongoing for almost a year and an injunction at this stage in the proceedings would particularly harm U.S-Japanese relationships. Thus, even if the questions presented by petitioner had been worthy of review, it still would be inappropriate to grant certiorari now.

While urging the Court to deny further review for these and other reasons, the United States wrongly faults the Eighth Circuit's opinion on three grounds. One focuses on an aspect of the decision that, as the United States concedes, is effectively dicta not clearly related to the holding, which itself "is necessarily case-specific." US Br. 17-18. The other two rest on policy rather than legal objections to the opinion and, upon examination, actually provide further reasons not to grant certiorari. The United States objects to the Eighth Circuit's reliance on international comity

rather than limiting itself to the "public policy" reflected in the repeal of the statute resulting in judgment. This Court has, however, rejected the proposition that courts are to function as auxiliaries of the State Department in this manner, and the United States cites no precedent for its peculiar conception of the judicial role. Similarly, the United States faults the Eighth Circuit for failing to recognize the common "issues" in the domestic and Japanese proceedings, yet it reaches that conclusion by ignoring the legal issues before the respective courts and instead analyzing the point as a diplomat would. The United States does not suggest that any foreign policy consideration favors review, which would only thrust this Court into a thicket of non-legal, policy matters traditionally left to the Executive Branch and neither presented nor addressed in the decisions below.

ARGUMENT

I. THE UNITED STATES CONFIRMS THAT EACH OF PETITIONER'S MAIN CONTENTIONS IS WITHOUT MERIT.

Petitioner seeks this Court's review based on (i) a purported split between the Second and Eighth Circuits concerning ancillary jurisdiction following satisfaction of a money judgment; (ii) an "important" conflict among nine circuit courts regarding the treatment of international comity in analyzing antisuit injunctions, Pet. 16, 19; (iii) conflict among the circuits regarding the treatment of comity, for foreign suits, following entry of U.S. judgment; and, along with *amici*, (iv) the "broad application" of the Eighth Circuit's decision to foreign clawback statutes, Pet. Rep. 10. The United States now confirms that none of these assertions is accurate or provides any basis to support this Court's grant of certiorari.

The "split" between the Second and Eighth Circuits is, as the United States confirms, illusory. Petitioner rests its claim on the supposed divergence between the courts regarding whether ancillary jurisdiction supporting an antisuit injunction exists following the satisfaction of a money judgment. According to petitioner, the Second Circuit held in the affirmative and the Eighth Circuit held in the negative. Pet. 17-18. The difficulty with this claim is that the Eighth Circuit set forth no such holding. At best, the decision is "unclear" on this point, analyzes instead whether the same "issues" are common in the domestic and foreign proceedings, but "can also plausibly be read" as addressing the money judgment issue. US Br. 13-14. It is absolutely clear, however, that the Eighth Circuit's treatment of jurisdiction following satisfaction of a money judgment is dicta and thus no basis for this Court's review: on the basis that different issues were before the Japanese and domestic courts, the Eighth Circuit held that international comity required and provided the principal, independent basis for vacating the injunction. See Pet. 54a-60a. So understood, the decision "would not conflict with the Second Circuit's jurisdictional holding ...." US Br. 17.

Similarly, there is no multi-circuit "conflict" concerning international comity. The circuits "all ... give weight to comity concerns," and their slightly different formulations of the issue have not "actually produced different results in cases with comparable facts." US Br. 18. Even if the different formulations had any practical significance, review of this case would be limited to an issue of no precedential value that "no court will ever be asked ... again." *Id.* at 19.

As the United States diplomatically points out, petitioner simply imagines a "conflict" caused by the

Eighth Circuit decision and related to comity as applied to the treatment of foreign suits following entry of final U.S. judgments. The Eighth Circuit did not "reject the 'settled' rule" and instead reasoned in a manner that "is difficult to reconcile with petitioner's characterization of the court's holding." US Br. 21. Indeed, petitioner can "identify [no] language in the opinion below that gives rise to the alleged conflict." *Id.*

Finally, contrary to petitioner's and its *amici*'s breathless warnings, the Eighth Circuit's decision presents no issue of significance concerning other "clawback" statutes. The United States might be expected to have a hair-trigger sensitivity to the use of such statutes as an instrument of international trade, but finds no cause for concern: "the United States is unaware of any other application of a foreign clawback statute against the United States in recent years, and it is not clear to what extent such cases will arise in the future." US Br. 20. The United States emphasizes that consideration of the issue in this case would have no precedential value because the statute has been repealed and was found by the WTO to violate international legal obligations. *Id.* And, this Court's review could interfere with "sensitive diplomatic ... questions." *Id.*

In sum, this case presents no conflict among the circuits or with decisions of this Court, presents no issue of general significance, and would result in a decision of this Court with no precedential value or broader effect other than potential harm to U.S. foreign policy interests.

II. THE EIGHTH CIRCUIT DID NOT "ERR" AS SUGGESTED BY THE UNITED STATES, WHICH FOCUSES ON POLICY RATHER THAN LEGAL CONCERNS THAT FURTHER COUNSEL AGAINST THIS COURT'S REVIEW.

In the course of confirming that this Court's review is unwarranted, the United States suggests that the court below erred in certain respects. Those claims either rest on concededly alternative readings of the Eighth Circuit decision or are related to the U.S. government's disagreements with EU, WTO, and Japanese officials' conclusions that the U.S. has not brought itself into compliance with its international treaty obligations. In essence, the United States faults the Eighth Circuit for focusing on traditional legal concerns rather than treating the case as a State Department official might. As this Court has elsewhere indicated, such policy perspectives are best advanced through diplomacy rather than judicial action, providing yet another reason that the Court should decline to review this case.

1. The United States claims that the Eighth Circuit may have erred in three respects. For the most important issue, whether ancillary jurisdiction exists after a money judgment has been satisfied, the United States acknowledges that it is "unclear" whether the Eighth Circuit's holding even rested on this issue. US Br. 13; see *id.* at 18. The government acknowledges that "[t]here is language in the court's opinion that could be viewed as limiting its holding to situations in which the issues to be litigated ... in the second proceeding are different from those in the earlier proceeding," *id.* at 13, and for the reasons outlined above this is clearly the better interpretation of the Eighth Circuit's opinion. See *supra* at 3. In

any event, this Court's review would be pointless for "error" correction of dicta without foreseeable prospective effect and touching on an issue that "arises only infrequently." US Br. 17.

2. The United States identified two other "errors" of the court below. As described below, the asserted bases for these errors are not that the Eighth Circuit's opinion departed from established law, but rather that the opinion's implications did not mirror the Executive Branch's foreign policy positions. These are not legal errors at all, and the risk that further judicial action might substitute for diplomatic initiative counsels against, rather than in favor, of this Court's review. See, *e.g.*, *Medellin* v. *Texas*, 128 S. Ct. 1346, 1363 (2008); *Dames & Moore* v. *Regan*, 453 U.S. 654, 686-87 (1981); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); *infra* pp. 10-11.

One of the two issues concerns whether an antisuit injunction might be appropriate because the Japanese proceedings would address "an issue that previously was presented to and decided by the federal court." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988); see also *Peacock* v. *Thomas*, 516 U.S. 349, 358 (1996) ("In determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief sought is of a different kind or on a different principle than that of the prior decree.") (internal quotation marks, alteration, and citations omitted). Under this traditional approach, the issues before the domestic and Japanese courts are clearly different: one proceeding addressed whether petitioner satisfied the distinct elements of the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004), and the other addressed respondents' ability to

claim against petitioner under a separate statute. The United States concedes this point: "[i]t is true that an action under the Special Measures Law [Law No. 162 of 2004 (Japan)] would not permit respondents to relitigate the underlying factual questions, or whether governing United States law imposed liability under such circumstances." US Br. 12.

This concession resolves the matter in support of the Eighth Circuit's reasoning under the test set forth in *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. at 147, and other leading cases, but it does not end the matter for the United States. Instead, the United States redefines the relevant "issue" in diplomatic rather than legal terms: "whether petitioner was entitled to be compensated for respondents' conduct in allegedly 'dumping' printing-press equipment in the United States ...." US Br. 12.[1]

This "issue" was not and will not be before either the district court that issued the antisuit injunction or the Japanese court that is handling the pending litigation under the Special Measures Law. It is framed at a level of generality far beyond that considered by judges and for which the antisuit injunction tests are designed. The district court considered facts bearing on each element of the 1916 Act. The Japanese court is now reviewing separate issues related to the nature of the parties before it

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[1] The United States' failure to address res judicata is particularly striking because res judicata principles provide an established framework for determining the relevant "issues" in common between two judicial proceedings and for setting the boundaries of legitimate exercises of judicial authority. Of course, those principles support the Eighth Circuit's focus on particular legal issues before the courts rather than the general issue identified by the United States.

and whether the particular predicates to relief under the Special Measures Law, including the existence of an order under the 1916 Act, exist. In contrast, State Department officials and their Japanese counterparts have been addressing and continue to address the scope of and remedies for any "dumping" of printing-press equipment and other goods. They, along with European diplomatic officials, have negotiated extensively and have pressed their positions on this trade policy issue before specialized international bodies designed to address just such disputes. See US Br. 2-4; see also, *e.g.*, Dispute Settlement Body Action, *United States – Anti-Dumping Act of 1916*, WT/DS136/8, WT/DS162/11 (Oct. 2, 2000). The United States faults the Eighth Circuit for failing to focus on that general trade policy issue rather than the legal determinations underlying the District Court's order.

The United States' mistake in too broadly characterizing the relevant "issue" at hand would lead Article III courts to intervene in policy matters more properly addressed as a diplomatic matter between governments. The Special Measures Law is simply one form of self-help that one government – here, Japan – can take when another violates an international legal obligation, as the WTO determined the United States did through the 1916 Act. The Japanese government might have as readily levied a tax on petitioner's trade, with proceeds to be paid to respondents, or imposed sanctions against respondents' competitors designed to compensate respondents for the United States' violation of international obligations. Under the United States' reasoning, these measures, just as much as the Special Measures Law, would have undermined the district court judgment in favor of petitioner. They

would have presented the same "issue," justifying an injunction against respondent or, conceivably, others who sought to undermine the financial effect of the U.S. judgment. But clearly, no principle of res judicata would provide authority for a court to exercise such extraordinary powers. Few constraints on the courts' injunctive powers would remain if, as the United States proposes, the relevant "issue" common to domestic and foreign proceedings is the general, diplomatic dispute defined without regard to the particular legal issues before the relevant courts.

3. The final "error" asserted by the United States concerns the weight the Eighth Circuit accorded Congress' prospective repeal of the 1916 Act. This claim reflects a basic disagreement between the United States and the Eighth Circuit regarding the proper judicial role in international trade disputes, and here the Eighth Circuit is clearly correct and strongly supported by this Court's decisions.

The United States claims that "the public laws enacted by Congress embody, by definition, the public policy of the United States" and "the prospective repeal of the 1916 Act brought the United States into conformity with" its international obligations. US Br. 15, 16. The Eighth Circuit erred, in this view, by not according greater weight to this public policy. *Id.* at 16.

This incorrectly characterizes the Eighth Circuit's treatment of the issue. In fact, the Eighth Circuit simply rejected the district court's view that the "policy" embodied in the prospective repeal of the 1916 Act "confers jurisdiction upon the court to maintain authority over the parties" and instead held that "[o]ur consideration of international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures

Law." Pet. App. 55a, 56a. Nowhere does the United States explain how the public policy that it finds in the repeal of the 1916 Act could justify an otherwise improper antisuit injunction. Nor could it. In addition, the Eighth Circuit correctly relied on international comity. That principle "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987); *Laker Airways Ltd.* v. *Sabena, Belgian World Airways*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("[C]omity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations."). However much the United States believes the Eighth Circuit should have advanced the government's rather strained view of U.S. compliance with its international obligations, controlling legal principles required the Eighth Circuit to attend to the impact that its decision might have on Japan's judicial processes.

More broadly, the United States' objection to this aspect of the Eighth Circuit's reasoning rests on a misguided conception of the judicial role in international disputes. Just as the United States would have courts issue injunctions based on the underlying diplomatic "issue" arising between the nations, so does it invoke "the position of the United States" on international "public policy" to determine the Eighth Circuit's proper exercise of injunctive powers. Courts are not, however, auxiliaries of the Executive Branch in the conduct of foreign affairs. Quite the contrary: "This result would be particularly anomalous in light of the principle that '[t]he conduct of the foreign relations of our Government is

committed by the Constitution to the Executive and Legislative – "the political" – Departments.'" *Medellin* v. *Texas*, 128 S. Ct. at 1366 (quoting *Oetjen*, 246 U.S. at 302). Contrary to the United States' argument, "'[t]he judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided'" *Id.* at 1363 (quoting *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829), *overruled on other grounds*, 32 U.S. (7 Pet.) 51 (1833)).

Finally, the United States claims that there was no basis for the Eighth Circuit to await the outcome of the Japanese proceedings. US Br. 16. This view considerably underestimates the complexity of the Japanese proceedings and the difficulties they would present for this Court's review of the case. The Japanese proceedings are ongoing. Petitioner has advanced a range of arguments in those proceedings that may lead to a ruling in its favor. Those proceedings may, indeed, be concluded at the trial level prior to the issuance of any decision by this Court. These practical considerations provide yet a further reason why this Court's review is unwarranted.

CONCLUSION

For the foregoing reasons and those stated in our previously filed opposition, the petition should be denied.

Respectfully submitted,

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June 2, 2008